

Natural Justice

The Development of
a Critical Philosophy of Law
from David Hume and Adam Smith
to John Millar and John Craig.

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PhD Thesis

University of Edinburgh

1978



The present thesis has been composed entirely
by me and its content is wholly my work.

Til mine forældre, Eline og Helmer Haakonssen

"Könnten nicht die Titel
Magister, Doktor, usw. zu
Taufnamen erhoben werden?"

Lichtenberg

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PREFACE

Although I am well aware that Lichtenberg in general is right when he says that "Die Vorrede könnte Blitzableiter betitelt werden", my feelings of gratitude to a number of people who have helped in connection with the present work are so genuine that they will justify this Preface.

My friend and teacher, George E. Davie, has taught me what I may know of Scottish philosophy and he is not to blame for all that I do not know. Without his wise encouragement my plans for a doctoral dissertation would have died with my first great teacher in Edinburgh, the late Professor H.B. Acton, who supervised my work during the last year of his life and whom I will always remember with the greatest respect and fondness.

I am indebted to Jeremy Shearmur in innumerable ways and not least for his encouraging, though inexplicable, trust in the present project.

Jill Stubington and Teoh Choon Hooi helped and helped, as usual. James Lingard did his best to make my Anglo-Danish more Anglo than Danish; and Mrs. Isobel Robin was extremely helpful in typing the work.

The woman behind it all has asked not to be mentioned. She deserves other thanks than those of a Preface, and knows it.

Finally, I would like to inscribe this volume to my parents whose moral support has made it easy, in my case, to be "the poor man's son whom heaven in its anger has visited by ambition".

K.H.

Howitt Hall, 17th December, 1977.

ABSTRACT

The thesis is that Hume and Smith between them outline a new theory of justice as the foundation for all social and political life. Justice is a mode of assessing social and political behaviour, the central point of which is that the motives behind such behaviour must not have an injurious tendency which would arouse the resentment of an impartial spectator. This means that they must be in accordance with a general rule which is negative, telling people what not to do to, and which thus ensures that the behaviour which is allowed as just is as widely compatible as possible with the rest of the values and aims accepted at any given time by a society. The latter can only be understood as they have developed through the interaction of individual men; and jurisprudence as a critical discipline is, therefore, dependent upon history and the new "science of human nature".

Justice is dealt with in the context of the general moral philosophy of the four authors, and it is shown how it stands apart as a negative virtue, the rules of which are enforcible for negative utilitarian reasons.

In connection with Smith and Millar a major objection to the present interpretation is cleared away by showing that their view of history was not economic and deterministic but of such a nature that it allows scope for natural justice.

Finally, it is shown how Craig changes the doctrine by discarding the theoretical role of history. This contributes to the breaking up of the tradition and points towards the new developments in political thinking in the 19th century.

ABBREVIATIONS

T.	David Hume, <i>A Treatise of Human Nature</i>
E.	David Hume, <i>An Enquiry Concerning the Principles of Morals</i>
TMS.	Adam Smith, <i>The Theory of Moral Sentiments</i>
W.o.N.	Adam Smith, <i>An Inquiry into the Nature and Causes of the Wealth of Nations</i>
Justice	Adam Smith, <i>Lectures on Justice, Police, Revenue and Arms</i>
Rhetoric	Adam Smith, <i>Lectures on Rhetoric and Belles Lettres</i>
Ranks	John Millar, <i>The Origin of the Distinction of Ranks</i>
Hist. View	John Millar, <i>An Historical View of the English Government</i>
'Life'	John Craig, 'Account of the Life and Writings of John Millar, Esq.'
Elements	John Craig, <i>Elements of Political Science</i>
Crito	Anonymous, <i>Letters of Crito</i>
Sidney	Anonymous, <i>Letters of Sidney</i>

THE PROBLEM

The problem from which the present work takes its starting point is this, How is fundamental legal criticism possible? This becomes a genuine problem if one rejects the two traditional opposites, natural law and legal positivism. That the former is discredited both in its old religious formulation and in its 17th Century rationalistic formulations I take to be one of the established achievements of David Hume.¹ To maintain that the latter is discredited would be to go against the general tendency of the legal philosophy of the English speaking world in the past century and a half. For although a simple voluntaristic version of legal positivism, such as has often been attributed to Hobbes, has found it increasingly difficult to find supporters - even in Scandinavia, some kind of more or less clear utilitarian version of positivism seems to be the most prevalent attitude to the status of law. Nevertheless, formidable arguments against such a position have been put forward.² The core of these arguments is that the utilitarian idea of law is too rationalistic and too "constructivist"; i.e. it presupposes an amount and a *kind* of knowledge about men and society, which it is in principle impossible for any one to have; and this again leads to a measure of centralised power which may be deemed undesirable and, indeed, may lead in totalitarian directions. It is not part of the present work to expound, or evaluate, this line of argument. My point is rather that anyone who takes this line, and who rejects traditional natural law theories, is obliged to give an explanation of how law can be fundamentally criticised, when the standards for such criticism are neither God-given nor deliberately man-made.

My thesis is that the basic elements of a highly original answer to this problem can be found in an isolated, but internally coherent tradition of legal thinking. I am thinking of the work of four Scotsmen: David Hume, Adam Smith, John Millar, and John Craig. The tradition is isolated in that it has had little influence on legal thinking - in spite of the mark Hume and Smith have put on other disciplines. That it is coherent is to be argued for below. Suffice it here to point out that it is handed down from older to younger friend and, with the exception of Hume and Smith, from teacher to student.

The reasons for studying this particular answer to our problem fall into three categories. 1) It is of the greatest inherent philosophical interest and, modern restatements apart, it is unique. 2) To see it as one coherent tradition and, indeed, to see it as concerned with our problem at all, is a new³ (and highly controversial) perspective from which to see this group of works. 3) Various unclarities in this body of thought may have been instrumental in the sudden upsurge of utilitarian legal positivism.

1. The central idea is of justice as part of, but a very special part of, moral values in general, the criterion for distinction being a highly original and valuable suggestion for how to distinguish between morality and law.⁴ And this suggestion is a clear precursor of modern ideas of 'negative utilitarianism'.

The general theory of moral evaluation is naturalistic and descriptive, being part of a general science of human nature. But it is more than this. For in combining a theory of human needs and human goal-

directedness with a theory of morality, and in particular justice, as social institutions, it achieves a set of principles by means of which law can be critically assessed. And this is done in a way which completely by-passes the traditional gulf between normative and descriptive disciplines - but without any confusions of *quæstio de facto* and *quæstio de jure*.

The tradition does, then, establish a new and original relationship between ideal "law" and *de facto* law. And this is indeed a new idea of the relationship between "history and theory"; for in order to view justice as a social institution, it has to be seen in an evolutionary perspective. And in starting these speculations about justice as an unintended by-product of human action and interaction, Hume even comes close to exploding the age-old, sharp distinction between natural and conventional (or artificial) phenomena. But that remains an unfulfilled promise.

In spite of its unusual foundations, this view of justice allows it to fulfil many of the critical functions of traditional natural law. First of all, it is, in a sense, a basic and universal justice. This is the basis for the criticism of relativist, and particularly positivist, ideas of law, which we find throughout the tradition. It is in terms of natural justice that all evaluation of positive laws and institutions takes place. It leads to a clear distinction between power and rights; between justice as the ultimate aim and the state and all positive institutions as mere means; between civil rights and natural rights.

2. Such are in my view the philosophical achievements that one can find in this tradition. It is, however, not exactly an interpretation which has impressed itself upon the world as the historically correct one. In fact it goes against much, if not most, established scholarship. First of all, most scholars are likely to dispute the point that there is one tradition at all. While one can talk of the Hume-Smith tradition or of the Smith-Millar tradition without being too controversial, to talk of a Hume-Smith-Millar tradition (no one talks of Craig at all) seems out of the question. Unless, of course, one makes the interpretation in so broad categories that every second Enlightenment figure would fit in. But my interpretation is not meant to be in such broad categories. It is meant to be the substantial claim that despite all their differences, our four Scotsmen use very similar ideas of natural justice as the focal point for their normative politics. But there is no denial that there are differences enough to hide this. There are differences in the evaluation of individual political institutions and events. And there are significant differences in intellectual style, ranging from Hume's and Smith's abstract philosophical speculations, to Millar's nearly exclusively factual approach in his sociology and history of law. But, as mentioned above, part of the thesis to be presented here is that the theory of natural justice, which we are trying to formulate, establishes a highly original relationship between the descriptive and the normative approaches to justice.

It may under all circumstances seem perverse to approach any or all of our thinkers from a perspective which in some respects comes close to that of "natural law". The whole "movement" of social thinking in

Scotland in the second half of the 18th Century has often been seen as little more than a confused overture to the clear-headed utilitarianism of the following Century. Particularly, Hume has been seen as the proto-utilitarian, and in no respect more so than in his theory of justice. Although this idea has noble ancestry in Bentham, I think it is wrong and one of the main sources of confusion about Hume's moral philosophy. And in the chapter on Hume I will outline why Hume could hardly mean the same by utility as Bentham and the later utilitarians did.

As far as Smith is concerned, one of the strongest - and most well received - interpretations of late years⁵ has been that Smith's concern was more or less exclusively with a *science* of morals. Part of the purpose of my treatment of Smith is to show that he had some very original ideas of how this science could be put to critical, political use, and that Smith's evaluative standpoint has some more bite to it than the "contemplative utilitarianism" which has been allowed him on this interpretation.

Smith's science of morals does, of course, include what is now called the social sciences, and one of the most popular exercises amongst scholars for many years has been to show that both Smith and Millar in this area present a body of doctrine which can only be characterized as materialism or economic determinism - or at least close approximations to it.⁶ Now, clearly such a reading of Smith and of Millar is incompatible with the thesis presented here, and I will accordingly outline my reasons for thinking that such a reading is misconceived. More particularly, I will try to show how ill founded is the further

step, which at least a couple of recent scholars have taken,⁷ namely to argue that Millar, in particular, often falls out of tune with the music of the spheres, i.e. the ages, in his normative political proposals, although he had come very close to the correct score in his history and sociology - and that he does so because of his own bourgeois class affiliation. This line of arguing against Millar obviously reflects on Smith as well - and it opens up the whole question about the relationship between Smith and Marx: is the latter right that the former is no more than a representative of English political economy, who begins to get vague ideas of the "problematic" of historical materialism? This is well outside the problem area of the present work, but clearly the truth of my thesis would entail the falsity of Marx's.

3. The fourth man in our team has received little mention so far. John Craig is all but forgotten and when he receives a footnote it is for the excellence of his economic work.⁸ To my knowledge Craig has never before been dealt with as a political thinker,⁹ in spite of the fact that he wrote a massive three volume work which possibly for the first time incorporated the phrase "political science" in the title. Craig is, however, of importance. As we will see below, he is in the direct line of inheritance from Hume and Smith, and he writes so late that he is able to demonstrate the ability of this tradition to deal with both the ideology of the French Revolution and the emerging utilitarianism. At the same time he is in a significant sense the last to carry the tradition: he receives it, and he changes it in a way which can properly be called its dissolution. This is of inherent interest, and it is of interest as showing up the deficiencies in the presentation

of the central ideas of natural justice in Hume, Smith, and Millar.

Neither of these thinkers wrote a book or even an essay dealing exclusively with justice and basic law. In Hume and Smith justice is dealt with in the much wider context of their general theory of morals - and Smith burnt the manuscript on jurisprudence which would have solved all our problems. Millar was primarily the legal historian and sociologist. And not only is the idea of justice with which we are here concerned rarely, if ever, presented on its own; the contexts in which it is put forward very often confuse the idea itself. We are, therefore, engaged, not only in uncovering, but to a certain extent also in reconstructing a theory. As shown in my criticism of contemporary scholarship, I do not believe that this work is being done today; and I also want to suggest, though not to argue in the present work, that it was not done at the time. For the 19th Century Hume was a historian, Smith the founder of political economy, and Millar - in so far as he was remembered at all - the historian of the constitution. This is, I think, important. For it meant that the utilitarian radicals got a very wide intellectual *Spielraum* in political theory, which soon paved a way to practice. That secular idea of natural justice which might have provided a third force between conservatism and radicalism was too well buried and too vaguely formulated. And this circumstance may well have been determining for the climate in which political theory and discussion has been conducted ever since.

This 19th Century perspective on the present work is not meant to form part of the work itself. But it lends a keen sense of importance

to the identification and explanation of the difficulties which we will meet in the theory of justice in our four authors.

The treatment of a theme like ours is inevitably incomplete. Although I have tried to place the theory of justice clearly in the wider philosophy of the four authors, it is the former and not the latter which is the main object of treatment. And although the broader historical perspective is important it is ideas rather than their effects that we are dealing with. Both limitations do, however, give such work an appearance of incompleteness. This may in the present case be heightened by a more specific limitation. It is not part of my thesis that no one else but Hume, Smith, Millar, and Craig contributed to the theory of justice with which we are concerned. In the early part of the tradition it would certainly be of interest to look at both Hutcheson and Kames. And, as far as the change and eventual breaking up of the tradition is concerned, it would be of importance to look into Dugald Stewart - and not least into what he may have taught James Mill - as well as into the politics of the *Edinburgh Reviewers*. And there may as well be other people of significance as well. It would, however, seem that this kind of completeness would be the bane of a study like the present one. The prime task must be to establish the existence and character of the particular theory of justice in the most central thinkers. It will then be a somewhat easier, but by no means uninteresting or unimportant enterprise, to relate other thinkers to it.

A further - and maybe surprising - incompleteness needs explanation.

I have left one source of information untapped, namely a number of students' notes from Millar's lectures. This is certainly not due to

lack of interest: these notes give us insight into Millar's views of areas of law, which we otherwise know little or nothing about; they give us some ideas about the development of his views; and they are, for reasons to be given below, of importance for the study of Craig's *Elements of Political Science*, as well as some anonymous works. However, to make a study of these notes within the framework of the present thesis is completely out of the question. The bulk of them is simply enormous. Apart from the notes on the course on English Law, where only one set is preserved, there are two or more sets on all of Millar's lecture courses; and all together more than twentyfive sets are known of. Of these some are fairly modest in size - but then very often in a more or less illegible shorthand. Some are in one way or another incomplete, so that various sets have to be collated in order to establish the general content of a course. And yet other sets are huge manuscripts of more than 600 handwritten pages. To which must be added that they stretch over a quarter of a century and show clear developments and changes of view. And where is a change or an inconsistency between two sets of notes due to Millar, and where to the student who took the notes? - To sort all this out and give reasonable answers to such questions is a task of such magnitude that it must constitute a study by itself. Very little has been done in that direction so far. Apart from very brief descriptions of the general theme in the Lectures on Government by Professor Lehmann and Dr. Medick,¹⁰ this vast material has never been in any way structured. So while such a study would be interesting and of historical importance, and while its outcome would throw some additional light on the present argument, we must renounce it here.

CHAPTER II

HUME'S THEORY OF JUSTICE

Section 1. One Theory or Two?

When Hume refused to follow Francis Hutcheson's advice to preach morality at the same time as he explored its foundations,¹ he clearly implied that his task was a factual and descriptive one. But when he added that his own "Metaphysician may be very helpful to a Moralist",² we can take it that he was aware of the principle that "ought implies can", and that his view of the "cans" was highly relevant for what view to take of the "oughts". The roots of the latter are given us by nature in the form of the activating forces in our life, as passions. In this sense the foundation of morality is private and subjective. And yet morality as such is something public and objective: it is that which binds people together and makes a society possible, and in this function it is dependent upon the existence of a common moral language.

Hume's task in his moral philosophy is, therefore, completely analogous to his task in epistemology: to explain how a common world is created out of private and subjective elements. For, as he expresses it,

"'twere impossible we cou'd ever make use of language, or communicate our sentiments to one another, did we not correct the momentary appearances of things, and overlook our present situation", but fortunately, "Such corrections are common with regard to *all the senses*". (T. 582; my ital.).

In order to fulfil this task Hume takes an approach which is both

psychological and social. On the one hand morality is a matter of the passions, and hence to be dealt with within the framework of his associationist scheme of the human mind. But at the same time the mind is seen not just as acting, but as interacting with other minds. For Hume, as well as for Smith, morality is not primarily accounted for in terms of the person acting and the subject of his action, but in terms of the reaction of the *observer* of men's dealings with each other. Morality thus arises out of such triadic relationships.

But before we outline how this happens, it may be useful to say a few words about the relationship between Hume's two main texts on moral philosophy, the third book of the *Treatise* and the second *Enquiry*, as far as the fundamental features of his theory are concerned.

It has been argued that the two works are fundamentally different, and that this shows a significant development of Hume's views³: In the *Treatise* Hume's problem is how morality is *constituted*, i.e. what forces are capable of forming morality, and the approach is accordingly psychological. But in the *Enquiry* morality is taken as a given social fact which has to be described and the function of which has to be explained. The approach is therefore distinctly social in the later work, and the whole cumbersome theory of the passions is left out completely. This is taken as a sign that Hume was in difficulties with his original program and, more importantly, that he was beginning to realize the independence of the various disciplines which had hitherto been integrated in one comprehensive moral philosophy - disciplines like psychology, morals proper, social and political disciplines etc.⁴ This alleged change from an interest in the individual

and his actions to an interest in the social effects of his actions, is further seen as an important step towards the utilitarianism of Bentham and the two Mills.⁵

There is much to be said for this line of interpretation. First of all, it gives the *Enquiry* an independent value, which is in accord with Hume's own high opinion about it: it is not to be seen as just a journalistic venture. Secondly, it makes sense of the obvious differences between the two works: The complicated theory of the passions is left out, and is explicitly declared unnecessary;⁶ in keeping with this, the concept of sympathy is no longer used in a strictly technical sense, but is now and then used interchangeably with fellow-feeling - although we know from the *Treatise* that it is not a feeling at all - and fellow-feeling seems nearly to include the moral evaluation itself; and finally, the concept of utility seems to be stressed much more strongly in the *Enquiry*.

These points do, however, seem to exaggerate the difference between the two works. Firstly, it is a fatal mistake to overlook that morality is clearly treated from the "social" point of view already in the *Treatise*, and that Hume's whole moral psychology is incomprehensible if the individual is not seen in a social context. This has already been indicated above, and it will become even clearer when we come to treat of justice below. Secondly, although it is true that Hume deliberately left out the theory of the passions in the *Enquiry*, this is certainly not a sign of a complete change of the substance of his theory. For in the very first Section of the *Enquiry* he states it as his aim to show the relative role of reason and sentiment in our

moral evaluations; and Section V, 'Why Utility Pleases', and Appendix I, 'Concerning Moral Sentiment', show clearly that ultimately they are passions. In this fundamental question there is thus no change.

And presumably Hume has not been all that dissatisfied with the theory of the passions in itself, since he republished it in shortened form some years after the *Enquiry* had appeared, as *A Dissertation of the Passions*.

Whereas the neglect of the theory of the passions in the *Enquiry* is real enough, I think that it is a total illusion to see the later work as an approach towards the utilitarianism of a later age.

Certainly the word utility is used more frequently, but it means the same as it did in the *Treatise*, and - as will be argued below - this meaning is rather different from what Bentham and the Mills meant.

And the verbal change itself is presumably the kind of difference we need in order to distinguish between an essay and a treatise.

It does, however, remain a fact that the theory of the passions is left out in the second *Enquiry*, and that one of the most central concepts in this theory, namely sympathy, seems to lose its original and somewhat technical meaning. This latter is the most significant clue we have in finding an explanation of the differences between the two works. It is, however, a clue which we cannot fruitfully follow up till much later in the present treatment of Hume's moral theory, for what I want to argue is that it is in connection with a special group of virtues that Hume's sympathy mechanism fails, namely the artificial virtues.

My tentative conclusion is, then, that Hume came to see that he could achieve the most basic purposes with his theory of morality without invoking the full detail of his theory of the passions: He could explain how morality is the cement of social life, in spite of the fact that it is "merely" a natural growth, and not a set of abstract truths, instituted by the reason of God or man and the subject of a calculating science. Consequently he emphasized the social perspective at the expense of the psychological for the purposes of the *Enquiry*. And this may well have been reinforced by the indicated difficulty in how sympathy can provide the connecting link between the passions and the artificial virtues. But it is difficult to believe that Hume should totally have given up his theory of the passions and their connection with morality. It seems to me that a false alternative is being presented when Hume is said to be *either* reducing morality (and social life) to psychology *or* innovatingly treating morality as a social phenomenon *sui generis* and the object of an independent social science. For the real methodological importance of Hume, as well as Smith, would seem to be that they begin to treat the theory of the human mind, including the psychology of the passions, as part of a social science, the object of which is the individual in his situation. This is the reason why the other person and the spectator, plus their actions and their language are of such importance in Hume's theory of knowledge as well as in his moral theory.

While the difference between the *Treatise* and the *Enquiry* can thus be taken as a clue to the true nature of Hume's theory of the passions rather than as evidence of its abandonment, it does make the later work less valuable for our present purposes. For when he to some extent

disregards the constitution of the various parts of morality, he takes away an aspect which - as we will see - is particularly important for our understanding of justice. The following account is, therefore, mainly based on the *Treatise*, although we will not forget the *Enquiry*.

Section 2. Moral Evaluation

Whenever we as spectators observe other men we only have their actions, their behaviour to go by, but we take this as a clue to their motives, and we are more interested in their motives because they are more firmly connected with their character or person.⁷ And in the end the objects of our moral evaluations are persons and their permanent characters.

Our reactions to our fellow men and their activities can be divided into two broad categories of negative and positive reactions; the first reaction being pain, the second pleasure. This of course also applies when we "observe" our own behaviour. Pleasure and pain are impressions, and they give rise by association to some resembling impressions. Those new impressions are pride, if the original impression was one of pleasure, and if the person concerned, i.e. the *object* of the passion, is oneself. . . . If the object is someone else, the new impression is love. And if the original impression is one of pain, the new impressions are humility or hatred, respectively. Finally, an association of ideas takes place between the idea of the original cause of pleasure or pain, and the idea of the *object* of pride or humility, love or hatred, - i.e. between the quality judged of, and the person concerned (oneself or some other person).

Pride and humility, love and hatred belong to the so-called indirect passions, and their formation by means of pleasure and pain is one of the necessary links in the chain of causes which forms our moral passions of approval and disapproval. Another vital ingredient is a certain natural *rapport* between men, a mechanism by which they can come to take some interest in their fellow-men. Unless such a thing exists, it is impossible to understand how that "objectivity", in the sense of "inter-personality", which is a distinguishing characteristic of morality, can come about. This is what Hume calls sympathy, which is *not* a passion, but a "principle of communication".⁸ The central feature of sympathy is a conversion of an idea into an impression. Whenever the behaviour of some other person gives us an idea of his present feelings, this idea is liable to be turned into an impression, i.e. into an actual feeling of a kind similar to the other person's. This conversion is liable to happen because we always have a strong and lively impression of our own self and any feelings, of which we initially have nothing but an idea, are therefore easily connected with the self and made our own, i.e. turned into impressions. It is, however, important to understand the place of sympathy in Hume's account of our evaluation of people: sympathy does not convey to us the motive or trait of character which is the object (or rather, in the person, who is the object) of our evaluation; what we sympathize with is the *effect* which this motive tends to have on other persons (or on the person himself). This effect, or tendency to have certain effects, is the *utility* (or disutility) which Hume stresses as a main determinant of our evaluations - and which is particularly dominant in the second *Enquiry*. It is thus sympathy with the utility, i.e.

tendency, of a quality of a character that is the *cause* of the passion which constitutes our evaluation; but it is the person with the quality who is the *object* of the evaluation.

This concept of utility is obviously of great importance for our understanding of Hume's moral theory. It is, however, more easily understood in the context of his theory of justice, where it becomes even clearer that it is significantly different from the idea of utility which we find in the later utilitarians.

It is not sympathy with utility, in the sense given above, that as such creates moral approval. There are further complications. Thus, although it is normally the *actions* of a person, the actual *effects* of his personal qualities, that bring about our sympathy, this is not a necessary condition. We can sometimes sympathize with the *imagined* effects of such qualities, although they may never be allowed to show themselves in *action* because of external hindrances. Our imagination is able to tell us what the effects of the qualities in question would have been, if the hindrances were removed; this starts the machinery of sympathy, and that again creates our evaluation of the qualities concerned. But although it is possible in this way to judge a person independently of his actual action, or lack of action, it would in practice be extremely difficult for men to do so to any large extent, if they were not supported by general habitual *rules* about the connection between motives and behaviour. Such general rules are amongst the most important means of creating an objective and intersubjective morality, which is independent of the accidental features of the given situation.⁹

The other important accidental influence on our evaluations - and indeed on all our impressions and ideas - is the particular situation in which we happen to be. As with all the senses we have to make allowance for our twisted perspectives when we judge morally. We are naturally inclined to have a more lively sympathy with those close to us in some respect than with other people. But we must remember that human nature is essentially uniform, and it is therefore possible to sympathize with any given person. And it is this side of sympathy that is the foundation for our ability to learn how to judge objectively, in the sense of inter-personally. For experience will soon teach us, not only that the same thing appears different to ourselves at different times and from different viewpoints, but also that our own evaluations vary from those of others, and that unless we approach each other's standpoints, it is difficult or impossible to communicate. Under pressure of the influence of actual spectators, everybody is thus forced to approach the standpoint of an independent spectator, or a general rule - and this even applies to our judgement of our own behaviour.¹⁰

I think that the preceding is enough to enable us to state the essentials of Hume's ideas of moral approval and disapproval, vice and virtue. Moral virtues and vices are those qualities in a person, which have a tendency to create such effects as by means of a sympathy, unbiased by regards to the actual success of or personal relation to the person judged of, cause a pleasure or pain in the observer - a pleasure or pain which by association of impressions call forth *calm*, as opposed to violent, versions of love and hatred; and the *idea* of the person with those qualities is, by association of ideas from the idea

of the cause of our pleasure/pain, called forth as the *object* of those two calm passions just mentioned; and those two passions are what is properly called moral approval or disapproval, according to Hume.

There are, of course, innumerable qualities in persons that are subject to moral evaluation, but they can all be reduced to four broad, non-exclusive groups: those which are immediately agreeable to ourselves (i.e. to the person with the quality), or to others; and those which are useful to ourselves, or to others.¹¹ Hume is not in doubt as to which are the most important:

"I am ... of opinion, that reflexions on the tendencies of actions have by far the greatest influence, and determine all the great lines of our duty". (T. 590)

Especially the last group of qualities, those useful to others, is important, because it comprises the so-called artificial virtues, including justice.

Section 3. The Motive for Justice - a Dilemma.

As already noted above, actions have a strong influence on men's moral evaluations. But ultimately they refer to the motive, and through the motive to the person, behind the action, as the real object of evaluation. This doctrine of Hume's means that any action at least partly derives its moral quality from the motive behind it, and he must therefore be able to show in each individual case what the motive is, and that it is subject to moral approval or disapproval, in the manner described above. This task leads to some *prima facie* difficulties with certain actions that are normally characterized as virtuous.

Those are the virtues Hume - for reasons to be explored later - calls artificial. They constitute an enormous complication of his moral theory, and the explanation of what at first sight seemed an exception, becomes an outgrowth that dominates the rest of the tree.

Hume clearly indicates the importance of the artificial virtues, and especially of justice. The treatment of them takes up more than half of the third Book of the *Treatise*, and in the *Enquiry* he virtually uses them as an introduction to the whole of his theory of the Principles of Morals; and the second Part of *Treatise*, Book III, deals with all of the artificial virtues, but it is called 'Of justice and injustice'.

Hume opens his treatment of justice¹² as we would expect him to, on the background of his general moral theory, by asking what the motive behind just acts is. For since we commonly regard such acts as virtuous, there must be a motive behind which is the real object of our judgement (or rather, which makes us judge the person with the motive virtuous). The most common motive referred to is, of course, a sense of duty or honesty and Hume explicitly allows that that *is* the common motive (T. 479). But as duty can only be understood in terms of justice, and thus presupposes that justice *is* a virtue, it is a circular justification of justice: we are back where we started, looking for a motive which has such a tendency as will, by means of sympathy with its supposed beneficiaries, give rise to moral approval (and its absence, disapproval).

Hume considers various alternative kinds of motives as possibly being behind just behaviour - and he rejects them all. They are; self-love, regard to public interest and, more generally, benevolence towards

mankind as such; and finally, benevolence towards the person to whom justice is being shown. Let us take them one by one.

First, it is clear that self-love *per se*, or unregulated, is directly contrary to justice. Or, as Hume has it,

"'tis certain that self-love, when it acts at its liberty, instead of engaging us to honest actions, is the source of all injustice and violence". (T. 480).

As to a regard to public interest, this is ruled out as a motive to justice by the following three arguments. First that there is no *natural* connection between public interest and observance of the rules of justice; they are only connected, as Hume says,

"after an artificial convention for the establishment of these rules". (T. 480)

And what exactly is meant by that can only be seen at a later stage of the argument. Secondly, many acts of justice are only a matter between individuals, without any public interest involved at all. Hume's example is a secret, private loan. (T. 480-81) Thirdly, it is a matter of fact that men only rarely have the public interest in mind,

"when they pay their creditors, perform their promises, and abstain from theft, and robbery, and injustice of every kind". (T. 481)

It may be remarked that this last argument seems somewhat beside the point; for although public interest may not be the motive behind acts of justice in a society, where you can already talk of creditors, promises etc., it might still in some sense be an original motive to justice.

Not even if we broaden the idea of a regard to public interest to a general benevolence towards mankind, will it carry the weight of being the original motive to just behaviour. And that for the simple reason that there is no such thing as a benevolence to mankind. Hume here introduces a useful distinction between sympathy with mankind, and sympathy with any given man. As all men are fundamentally alike, we have an ability for the latter, and thus for coming to feel benevolence towards any man. But he has to be a concrete man. We cannot sympathize with abstract mankind as such. (T. 481-82)

The last class of possible natural motives for just behaviour that Hume considers is "private benevolence, or a regard to the interests of the party concerned" (T. 482), i.e. the person to whom justice should be shown. This is obviously implausible, since it is a characteristic of justice that it is shown to friend and foe alike, i.e. regardless of personal relations. And, furthermore, benevolence is variable from person to person (T. 482-83), whereas justice is embodied in a general rule that does not take into regard who the persons involved are.

The upshot of this first Section on justice in the *Treatise* is a dilemma. Justice exists as a moral fact, for we do consider just acts as virtues. It is a social fact as well, for it is articulated in rules, which we consider as obligatory. And it is a psychological fact too, for we do at least sometimes behave justly with nothing but a regard to justice as our motive. But the existence of all these facts presupposes as their origin a natural motive, which is morally approved of, in the manner described at the beginning of this chapter - and such a motive can not be found:

"From all this it follows, that we have naturally* no real or universal motive for observing the laws of equity, but the very equity and merit of that observance; and as no action can be equitable and meritorious, where it cannot arise from some separate motive, there is here an evident sophistry and reasoning in a circle. Unless, therefore, we will allow, that nature has establish'd a sophistry, and render'd it necessary and unavoidable, we must allow, that the sense of justice and injustice is not deriv'd from nature". (T. 483)¹³

This is in a way a rather dramatic place in the *Treatise*. For to say that something is not derived from nature seems tantamount to saying that Hume's naturalistic program for a science of human nature has broken down. And yet Hume thinks that his theory of the artificial virtues, especially justice, can avoid this difficulty. For he continues the passage just quoted, saying that the sense of justice

"arises artificially, tho' necessarily from education, and human conventions". (T. 483, my ital.)

When something arises necessarily, it can also be explained by means of that which necessitates it, and that is exactly what he intends to do.

If we look upon this first Section on justice in isolation, we can, as I have pointed out elsewhere,¹⁴ see that it is of quite some methodological importance. For it in a way amounts to an argument against what we would now call a psychologistic explanation of one of the most central social institutions at all. And in keeping with this, we see that Hume premises his further discussion with a remark to the

effect that we have to draw social phenomena into consideration, in order to find a satisfactory explanation - namely what he broadly describes as "education, and human conventions". Given the structure of the *Treatise*, with its elaborate theory of the passions as the background for the moral theory proper, it is only too easy to see Hume's approach as wholly psychological. And, indeed, much of the problem-situation he inherited was psychological; I am thinking of Hobbes, and to some extent also Hutcheson. But this must not lead us to overlook the fact that the moral sentiments are right from the start accounted for by means of a minimum of a social framework, namely the spectator situation, as I pointed out earlier in the present Chapter. And it is this social or institutional framework that is greatly added to when Hume comes to the artificial virtues. For whereas his original problem was how values emerge in a world of natural facts (namely as a certain set of passions), the difficulties in accounting for the artificial virtues, represented at first and mainly by justice, forces him to go one step further back and ask, how certain *social* phenomena can emerge in this world, - for he needs those social phenomena to explain the emergence of a good deal of the values. As far as this institutional aspect is concerned, Hume was quite undoubtedly very much influenced by modern natural law theories in Grotius, Pufendorf and others.¹⁵ But his real genius was to combine the strands of his inheritance into a completely new sort of natural law theory - for, indeed, he is quite willing to call his idea of justice *that*, provided we let him fill in the contents himself. (T. 484) And that is what he starts doing in the following Section, 'Of the origin of justice and property'.

Section 4. The Origins of Justice

Given that justice is not established as a moral virtue by means of a natural motive, Hume, then, takes the approach, that first it must be shown how justice comes into existence as a social practice, or institution, and *then* he will show how we come to get the proper passion, called moral obligation, to adhere to it. In other words, he distinguishes between

"two questions, viz. concerning the manner, in which the rules of justice are establish'd by the artifice of men; and concerning the reasons, which determine us to attribute to the observance or neglect of these rules a moral beauty and deformity." (T. 484, the passage is italicized in Hume.)

The former question, which is one of our main concerns, takes up nearly the whole of the present Section, while the latter is not finally answered till the first Section of Part III, where he makes the transition from the artificial to the natural virtues.

It is important to remember that the whole of Hume's discussion of how justice arises as a social institution is itself set in a social framework from the outset. He simply points out that man, considered individually, does not have any ecological niche, and that he is only able to acquire one by living *some* kind of social life. The extant members of the species are thus necessarily social. (T. 485)

The bare minimum of social life is the family society; and that is held together by sexual and parental feelings. This latter fact might be taken as an attempt, after all, to reduce this minimal social institution

to psychological principles. But that clearly won't do, for these passions are themselves to be accounted for inter-personally; and they are only socially formative in a more or less hostile *environment*. (T. 486).

This minimal social life, which men necessarily must lead, is sufficient to let justice emerge, and it is justice which creates the possibility for the development of social life on a larger scale. But Hume never makes it absolutely clear to what extent justice is established within the family society, and to what extent it only comes about as a relationship between families. On the one hand he does say that

"every parent, in order to preserve peace among his children, must establish the rule for the stability of possession." (T. 492-93).

But on the other hand he points out that family societies naturally develop a tribal morality, which includes a strong partiality against other such societies, (all men are governed by self-love and a confined generosity - confined to the family). And it is this friction between tribal societies, that justice has to overcome. (T. 488-89) The obvious solution is, of course, that the faint beginnings of justice in the small society have to be transplanted to a larger scale (e.g. T. 489).

Justice is an absolutely necessary ingredient in any kind of social life. At least some minimum of it must be present, for justice is, as already indicated,

"a remedy to some inconveniences, which proceed from the

concurrence of certain *qualities* of the human mind with the *situation* of external objects. The qualities of the mind are *selfishness* and *limited generosity*: And the situation of external objects is their *easy exchange*, join'd to their *scarcity* in comparison of the wants and desires of men." (T. 494)

It will be seen that for Hume the origin of justice is to be accounted for in terms of challenges to the possession of *external* goods. The reason he gives for this is simply that the other kinds of "goods", as he calls them, namely "the internal satisfaction of our mind" and "the external advantages of our body" (T. 487), cannot be of any use for another person, and they are therefore not matters of dispute. This seems a little odd, for it seems to restrict Hume's concept of rights that are protected by rules of justice to property rights. Now, there is of course no reason why he should not be able to account for our more personal rights, by simply saying that our concept of right is extended to include those, when people become more and more civilized. Nevertheless, it is of quite some importance that he does not do so, and that he deliberately concentrates his theory of the origin of justice around the concept of external goods - and with a reference to what can be of use for people. For it is exactly those points that Adam Smith takes him to task for, and John Millar follows Smith in this, as we will see later in this thesis. For Smith, men are quite likely to try and dominate their fellows just for the sake of dominating. So in the end this seems to show a certain difference in the ideas of what kind of creature man is: is he primarily concerned with bettering his lot, or with dominating his fellows? Be

that as it may, Hume and Smith would undoubtedly find common ground in pointing out that bettering one's lot is in fact one of the main instruments for dominating one's fellow men.

The background for the emergence of justice and society is a combination of the qualities of the human mind, and the external situation in which men find themselves. Hume underlines this argument strongly by showing that if we imagine that either of the two, the qualities or the situation, be changed materially, then justice would not arise. In other words, justice is not by nature with man, as man; it is only with him as man in a special situation.

Those imagined situations are presented both in the *Treatise* and in the *Enquiry*, but like so many of the more spectacular and dramatic elements in Hume's argument, they are dealt with more extensively and systematically in the latter work. First Hume asks us to imagine that our external situation be changed to one of complete abundance in everything.

"It seems evident that, in such a happy state, every other social virtue would flourish, and receive tenfold increase; but the cautious, jealous virtue of justice would never once have been dreamed of. For what purpose make a partition of goods, where every one has already more than enough? Why give rise to property, where there cannot possibly be any injury? Why call this object *mine*, when upon the seizing of it by another, I need but stretch out my hand to possess myself of what is equally valuable? Justice, in that case, being totally

useless, would be an idle ceremonial, and could never

possibly have place in the catalogue of virtues." (E. 183-84)

This situation is in fact taking place in the few cases where things are abundant in the actual world. Hume mentions the cases of air and water in most parts of the world. (E. 184; T. 495)

Equally if we suppose that human nature be transformed, so that the human mind is completely dominated by generosity and general benevolence to every other man:

"it seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence, nor would the divisions and barriers of property and obligation have ever been thought of." (E. 185)

And again this is a situation which is approached in the real world in the relations between friends and members of the same family; and it is an ideal which has inspired "fanatics" with such "enthusiasms" that they have tried it on a larger scale - only to be taught a lesson by experience about the "selfishness of men." (E. 185-86; cf. T. 495)

Finally, Hume invites us to imagine the direct reverse of the two situations quoted above.

"Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property?" (E. 186) Indeed not.

And "suppose likewise, that it should be a virtuous man's fate to fall into the society of ruffians, remote from the protection of laws and government; what conduct must he embrace in that melancholy situation? ... He ... can have no other

expedient than to arm himself, to whomever the sword he seizes, or the buckler, may belong: ... his particular regard to justice being no longer of use to his own safety or to that of others, he must consult the dictates of self-preservation alone, without concern for those who no longer merit his care and attention."

(E. 187)

And as the quotations show, those two situations are certainly instanced in the world in which we live - not least in a civil war.

(E. 187-88)

Taken together the two first imagined situations amount to a description of "the *poetical* fiction of the *golden age*" (E. 188-89; T. 493-94), whereas the two latter give the elements of "the *philosophical* fiction of the *state of nature*" (E. 189; T. 493). Both are, of course, "an idle fiction",¹⁶ but they serve Hume well to underpin his point,

"that 'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin." (T. 495; cf. E. 188)¹⁷

All those reflections lead up to the main problem: how does justice arise from the combination of human nature and its particular environment? Hume's answer is, in a sense, very simple. He simply points out that men in general are not so stupid that they do not see that most of the trouble in the world arises when one man makes free with what is in somebody else's possession. Only "slight experience"

(E. 195) with this, and "the least reflection" (T. 492) on it, is required to make men abstain from such violence. But what does this more particularly mean in terms of the operation of the passions? It simply means that when men see that acting on self-love-cum-confined benevolence is self-defeating in the world such as it is, this leads to a restraint of these "interested passions" - but a restraint in the sense of a re-direction of them. For those passions will be satisfied much more easily in a social situation:

"Instead of departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both these interests than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as our own." (T. 489)

Whatever else men may be inspired by, we know that they are at least under the guidance of the interested passions, and

"'tis certain, that no affection of the human mind has both a sufficient force, and a proper direction to counter-balance the love of gain, and render men fit members of society, by making them abstain from the possession of others. ... There is no passion, therefore, capable of controlling the interested affection, but the very affection itself, by an alteration of its direction."

(T. 492)

Although Hume does not say so explicitly in this context, we must undoubtedly understand this idea about the interested passion restraining itself by finding a new direction, or outlet, in terms of his

theory of the calm passions. For the passion keeps its identity, but it gets another emotional strength, through "the least reflection" on our situation, reflection being one of the things that can make a passion calm *and* strong, but not violent.¹⁸ That he does have this theory in mind, is also given some support from the fact that he draws it in, when he returns to the problem of how to make the rule of justice being observed, in the Section 'Of the origin of government'. (T. 536-37)

"Slight experience" and "the least reflection" lead us to abstain from our neighbours' possessions, by making us enter a *convention* about this, "a convention enter'd into by all the members of the society to bestow stability on the possession of those external goods, and leave every one in the peacable enjoyment of what he may acquire by his fortune and industry." (T. 489)

But Hume's idea of a convention must be attended to with much care.

For

"this convention is not of the nature of a *promise*: For even promises themselves ... arise from human conventions." (T. 490; cf. E. 306)

It is difficult to say exactly what Hume means by entering into a convention, but let me first quote his own description, and afterwards see what can be made of it:

The convention "is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. I observe,

that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition that something is to be perform'd on the other part." (T. 490; cf. T. 498 and E. 306)

And Hume then goes on to liken this to situations where two men are rowing a boat, and to the conventions about language and money.

In a way the most natural way to read the passage just quoted is that men actually express their common interest verbally. But on the other hand, this would come pretty near to a promise. And, furthermore, Hume does say explicitly that it is the individual *actions* of abstaining from the other person's property that have a reference to each other. And this reading is also supported by at least the first of the parallel examples he mentions, namely the rowing of a boat. So on the whole the most reasonable reading seems to me to be that it is actually the individual actions that function as signs or expressions of the common interest.¹⁹ The parallel passage in the *Enquiry* does not offer much help: both expressions and actions have disappeared in any recognizable shape:

"if by convention be meant a sense of common interest; which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others, into a general plan or system of actions, which tends to public utility; it must be owned, that, in this sense, justice arises from human conventions." (E. 306)

At first sight this is a rather trifling difficulty in Hume's idea of the conventional origin and character of justice. But if we attend more closely to it, immensely important problems will open up to us. When Hume begins his account of the convention in the passage just quoted from the *Treatise* above, he talks of "a general sense of common interest; which ... all the members of the society express to one another" (my ital.); and this universality requirement tallies with Hume's often expressed view that it is of the essence of justice that it is a general rule (e.g. T. 497 and 531-33). But both the fact that the passage just quoted smacks of verbal expression, and something very close to a promise, and this universality requirement are hard to reconcile with Hume's repeated insistence that justice is a slow growth, something developing through the ages.²⁰ For if justice only is justice when it is universal within a society, then it seems as if its institution must happen as one single event, such as our passage seems to suggest. Yet Hume does within the same paragraph say the following:

"Nor is the rule concerning the stability of possession the less deriv'd from human conventions, that it arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it." (T. 490)

No, quite; but then the convention, from which it derives, can hardly be an event at which "all the members of society express a general sense of common interest." It is, however, exactly in the light of this difficulty that it is so interesting to see Hume, later in our passage, go on to account for the actual moves in the convention in terms of individual *actions* between given persons, as pointed out above. For actions do not carry any implications of universality. They can act as "an example to others". (T. 498) And if justice is understood to develop by imitation of examples of it in action, *then* we can understand why Hume says that "it arises gradually, and acquires force by a slow progression".

From what I have said so far, it should be relatively clear that in this passage about the convention about justice, we in fact have the indications of two widely different views of the origin of justice. On the one hand what may fairly be called a rationalistic and contractarian view and on the other hand an evolutionary view. On the former view justice is instituted as a general rule by all the members of a society. On the latter view it grows out of a practice which slowly becomes more and more general.

The rationalistic view immediately strikes one as rather un-Humean, and the evolutionary one seems to be the one borne out by the whole trend of Hume's discussion. On the background of such an impression one might try to account for the rationalistic view of the convention as a mere methodological device for Hume. On such an interpretation Hume is really saying that the qualities of universality and conventionalism make justice a phenomenon, which exists *as if* it had been insti-

tuted by men as such a thing, whereas its real origin must be accounted for by an evolutionary theory.

This is an attractive interpretation, but there is rather little to support it in Hume's text. First of all, Hume does not say that the convention is to be taken only as a methodological device, such as he does with the state of nature. And Hume was in general not the person who missed a chance to drive a methodological rule home. Secondly, Hume does give the above mentioned rationalistic indications, as well as others to be described below, in the run of stating the efficient causes that lead to the institution of justice. And thirdly, we would like to see some kind of bridge established explicitly between, on the one hand, the efficient causes of the evolutionary strand of the theory and, on the other hand, the "final causes" (i.e. the functions of justice) imaginarily accounted for by a rationalistic convention. But no such bridge is established explicitly, and this speaks against Hume's consciously using the rationalistic convention as a mere methodological tool.

In order to get any further in this matter, I will first describe what I am convinced would be Hume's considered view of the origin of justice. I will then discuss in what sense this justice is artificial for Hume. And this will enable us to discuss, and maybe to some extent explain, what I have called his rationalistic indications.

Hume's considered view of the origin of justice must be evolutionary. He says so emphatically in the *Treatise*, as we have seen above; and in the *Enquiry*, which is otherwise not very specific in those matters, we have his sketch of how justice and society develop together. (E. 192)

But let us characterize this theory more closely. As we have seen already, it accounts for the development of justice in terms of individual acts, which are imitated more and more widely. If we pay attention to the nature of these actions, we will see that they are exceedingly simple, being in reality pieces of inactivity - namely the "abstaining from the possessions of others". (T. 489) All this tallies with Hume's often repeated insistence that the role of reason is very modest at the institution of justice (and thus of society): "Vulgar sense and slight experience are sufficient". (E. 195) For if the rule for the stability of possession

"be very abstruse, and of difficult invention; society must be esteem'd, in a manner, accidental, and the effect of many ages. But if it be found that nothing can be more simple and obvious than this rule; that every parent, in order to preserve peace among his children, must establish it; and that these first rudiments of justice must every day be improv'd, as the society enlarges: If all this appear evident, as it certainly must, we may conclude, that 'tis utterly impossible for men to remain any considerable time in that savage condition, which precedes society; but that his very first state and situation may justly be esteem'd social." (T. 493)²¹

This idea that only a very low degree of rationality is involved in the origins of justice is extremely important, for it allows Hume to point out a nearly paradoxical disparity between causes and effects. The causes are a presumably immense number of individual actions, which all are done out of restrained, regulated (or, so to speak, enlightened)

self-love *cum* confined benevolence. But the end effect is a set of universal or general rules, which are absolutely vital for the very existence of society, and thus for the individual, and which in that sense have as strong a "natural tendency" to the public good, as could be imagined but which yet may very easily be directly contrary to both private and public good in their application to individual cases.

"Judges take from a poor man to give to a rich; they bestow on the dissolute the labour of the industrious; and put into the hands of the vicious the means of harming both themselves and others. The whole scheme, however, of law and justice is advantageous to the society, and* to* every* individual*." (T. 579; and see also e.g. *ib.* 497 and 531-33, and E. 304-306)

The over-all, or long-term, effect of individual men's "selfish" actions is thus something very far removed indeed from what they did have, and could have, in mind. The idea of justice "wou'd never have been dream'd of among rude and savage men". (T. 488) Justice, in the form of institutionalized general rules, is the *effect* of individual human actions, but they are not *intended* effects. And this is not just a doctrine which is implied in what Hume has to say about justice: it is an explicitly stated idea:

"Those rules, by which property*, right*, and obligation* are determin'd ... have all of them a direct and evident *tendency* to public good, and the support of * society. This last circumstance is remarkable upon two accounts. First, because, tho' the cause of the establishment of these laws *had been* a regard for the public good, as much as the

public good is their natural tendency, they wou'd still have been artificial, as being purposely contriv'd and directed to a certain end. Secondly, because, if men had been endow'd with such a strong regard for public good, they wou'd never have restrain'd themselves by these rules; so that the laws of justice arise from natural principles in a manner still more oblique and artificial. 'Tis self-love which is their real origin; and as the self-love of one person is naturally contrary to that of another, these several interested passions are oblig'd to adjust themselves after such a manner as to concur in some system of conduct and behaviour. This system, therefore, comprehending the interest of each individual, is of course advantageous to the public; *tho' it be not intended for that purpose by the inventors.*" (T. 528-29; italics rearranged by me)²²

If we first take what is implied by the use of the subjunctive mood under the first point in this quotation, we get that the cause of justice is not a regard for the public good, (and that is said explicitly elsewhere: T. 495 and cf. 499), although that is the effect it naturally tends to. In the latter half of the citation we are then told that the individual "interested passions" have to "adjust themselves", and thus form a "system of conduct and behaviour". And finally, it is explicitly underlined that the whole outcome is "not intended ... by the inventors".

And later in the *Treatise* we find Hume adding a clarifying marginal note. In the text he says that justice, allegiance, the laws of nations, etc., "are mere human contrivances for the interest of society",

and then he adds

"The Inventors of them had chiefly in view ... their own Interest. But we carry our Approbation of them into the most distant Countreys [sic] & Ages & much beyond our own Interest." (T. 577)

In other words, one thing is how justice is established, quite another matter is our relationship to it once it is established.

To see justice in this way, as an unintended consequence of individual human actions, must be one of the boldest moves in the history of the philosophy of law. And it is as ingenious as it is bold. For it allows Hume to avoid any excessive rationalism, of a Hobbesian kind²³; although justice is a result of human activity, it is not deliberately constructed by men.²⁴ And in this sense Hume avoids the pitfalls of legal positivism, and keeps the options open for some kind of "natural law", or basic law, above all positive law. On the other hand Hume is able to keep the origin of justice well within the natural world: he is able to specify the specific causes that bring it about, namely the actions (and interactions) of individual men. He, therefore, has no need for any divine interference - or, for that matter, for any special moral sense. True to his general empiricist leanings and to his Newtonian rules of philozophizing he can account for the origins of justice in terms of well-known and very general human passions (restrained self-love *cum* confined benevolence), actions (prudent abstention from the possessions of others), and interactions (*mutual* abstention and imitation).

The idea of social institutions as the unintended effects of human

actions is in itself a negative doctrine.²⁵ It merely says what is not the cause of the institutions concerned. It therefore in a way just broadens our quest, for we then want to know not only what actions in fact caused which institutions but also what motivated those actions. For if we can find those motives, we may find an explanation of why the intention of creating the institution in question could not be part of those motives.

Now it is a significant fact that Hume's theory satisfies us on this point. For he only reaches the conclusion that justice is an undesigned and unenvisaged institution, after having scrutinized the causes and after having found what a modest role constructive reasoning has to play in the process.

The idea that some social phenomena are the unintended effects of human actions is not original with Hume. As F.A. von Hayek has pointed out²⁶ it is in modern times clearly anticipated by Bernard Mandeville. But Mandeville uses the idea in a rather general sort of way, without too much attention to the details of the links between the individual causes and the over-all effect. And, also, he mostly uses the idea in an economic context, which was of course the context in which the idea should become particularly famous with Adam Smith. But the particular boldness in Hume is that he uses it in accounting for one of the traditionally most central, and in a way most "sacred", elements in social life at all, namely fundamental law itself, our very "sense of justice". It is one of the most important parts²⁷ of his philosophical justification for replacing traditional natural law with a secular and empirical conception of fundamental law, which makes it

truly "natural" in the sense that it can be accounted for within his science of human nature and thus be accounted a full member of his Newtonian universe. And yet it does, in common with traditional natural law theories, find the roots of justice beyond any rational human deliberations, and far beyond our present society.

In this last respect Hume's theory is obviously in line with the Common Law tradition and with Burke. And he would find further common ground with those thinkers in the stress on the historical development of justice. But this must not make us blind to the very decisive difference there is. For Hume would never say that the antiquity of law in itself justified it. Its historical development would be of the very highest importance for our understanding of it, and for our chances of changing (or preserving) it. But it would never be one of our principles of evaluation. The exact nature of these principles will be explained below; but it should be pointed out already here that this balance between the history of law and its theory is one of the persisting themes all through the tradition with which we are dealing, and we will return to it repeatedly.²⁸

Section 5. Nature and Artifice

Throughout his treatment of justice Hume is concerned with its metaphysical status. As we have seen, he sees it as a main point to show that it has natural causes and yet he calls it an artifice or contrivance, instituted by men conventionally. The distinction between nature and artifice seems from the very structure of the *Treatise*, Book III, to be of fundamental importance in Hume's moral theory. Part II

deals with the artificial virtues, while Part III opens with his account of the natural virtues, and then goes on to gather up the threads of the theory as a whole. But let us see whether it really is of such importance.

In the first Section of Part II, where Hume has asked 'Justice, whether a natural or artificial virtue?', and where he has come down firmly in favour of the latter, as we have seen earlier, he concludes with the following clarification of "natural" and "artificial" as applied to justice:

"I must here observe, that when I deny justice to be a natural virtue, I make use of the word, *natural*, only as opposed to *artificial*. In another sense of the word; as no principle of the human mind is more natural than a sense of justice; so no virtue is more natural than justice. Mankind is an inventive species; and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as anything that proceeds immediately from original principles, without the intervention of thought or reflexion. Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species." (T. 484)

Two things stand out in this passage; that artificial phenomena are the result of the intervention of "thought and reflexion" and that they, paradoxically, are natural in the sense that they exist with the same necessity as everything else in this world - which, of course,

means that they have natural causes bringing them about. Those two points naturally presuppose that "thought and reflexion" can be accounted for in terms of such causes. We of course know that to be Hume's position, and he explicitly refers to it the first time he in the *Treatise* discusses the distinction between natural and artificial in connection with moral qualities:

"Nature may also be opposed to artifice, as well as to what is rare and unusual; and in this sense it may be disputed, whether the notions of virtue be natural or not. We readily forget, that the designs, and projects, and views of men are principles as necessary in their operation as heat and cold, moist and dry: But taking them to be free and entirely our own, 'tis usual for us to set them in opposition to the other principles of nature." (T. 474)

In other words, Hume invokes ^{his} methodological determinism²⁹ to say that although justice and the like are artificial phenomena, because they are brought about through the intervention of men's rational powers, they are yet securely within the orbit of the natural world, because the activity of the rational powers can in itself be explained by means of natural causes. And as we have seen, this means that men's situation in the world is such that "vulgar sense and slight experience" necessarily brings the "interested passions" to restrain themselves and thus our behaviour towards our neighbour etc.

This theme, that artificial phenomena have their specific character because our rational powers are involved in their causation, and that those powers and their activity are in themselves a link in nature, turns up again and again. Thus:

"The remedy [for men's plight in the world] ... is not deriv'd from nature, but from *artifice*; or more properly speaking, nature provides a remedy in the judgement and understanding, for what is irregular and incommodious in the affections." (T. 489; and cf. 475, 477, 484, 493, E. 307).

On closer examination it therefore turns out that the distinction between natural and artificial, which at first sight seemed so fundamental for Hume, from one point of view is not very fundamental at all. Artificial things have causes as natural as any others, and the distinction is, therefore, in this view, rather verbal. It is accordingly not at all surprising to find Hume warning us in the *Treatise*, that "there is none more ambiguous and equivocal" than "the definition of the word Nature";³⁰ and in the *Enquiry*, that "The word *natural* is commonly taken in so many senses and is of so loose a signification, that it seems vain to dispute whether justice be natural or not." (T. 474 & E. 307) And it is with a sense of relief that one reads in a footnote, that "all these disputes are merely verbal." (E. 308) We must conclude that Hume, as we would expect, is absolutely intent on keeping nothing but purely natural, efficient causes in his universe, and in accordance with this we see him declare in a letter to Francis Hutcheson, to whom he had sent the manuscript of the third Book of the *Treatise*:

"I cannot agree to your Sense of *Natural*. Tis founded on final Causes; which is a Consideration, that appears to me pretty uncertain & unphilosophical. ... I have never call'd Justice unnatural, but only artificial."³¹

It is clear that Hume is engaged in a discussion of a distinction that

is nearly as old as Western philosophy, the distinction between *nomos* and *physis*, the conventional, or artificial, and the natural,³² and I think that his immediate inspiration to go into it very likely is Hobbes.³³ The negative side of his discussion of it, which we have now been presented with, seems to lead to the conclusion that it is really a non-distinction. But nevertheless Hume keeps using the distinction and if we take this as an indication that there is *some* use for it in one sense or another, we are not all that wrong.

In at least one place Hume takes a somewhat abstract view of artificial phenomena, represented by justice, not only from the point of view of their origin, but also from the point of view of their characteristics, once they are created:

"Those rules, by which property*, right*, and obligation* are determin'd, have in them no marks of a natural origin, but many of artifice and contrivance. They are too numerous to have proceeded from nature: They are changeable by human laws: And have all of them a direct and evident tendency to public good, and the support of * society. This last circumstance is remarkable ... because, tho' the cause of the establishment of these laws had been a *regard* for the public good, as much as the public good is their natural tendency, they wou'd still have been artificial, as being purposely contriv'd and directed to a certain end."

(T. 528-529)

It is the third and last mark of artificiality mentioned here, I want to concentrate on. As already pointed out earlier, the subjunctive mood clearly implies the point which Hume makes explicitly a little

later, namely that the "aim" of the rules (the public good) was not an *intended* aim. But he then goes on to say that even if this had been the case, the rules "wou'd still have been artificial, as being purposely contriv'd and directed to a certain end". In other words, it is the fact that the rules of justice have a *purpose* or an *end*, that makes them artificial. But although the passage clearly implies that there is a difference between an *intended* aim and an "aim" that is just a "*natural tendency*", Hume never brings this out clearly in his reasoning about the distinction between natural and artificial. This is a pity, for Hume is as close as could be to a very important revision of the distinction between natural and artificial. If he had worked out what he implies in the passage quoted above, and in his whole theory of justice as an unintended consequence phenomenon, he would have seen that there is a third category between natural and artificial, which shares certain characteristics with both. The things in this category resemble natural phenomena in that they are unintended and to be explained in terms of efficient causes and they resemble artificial phenomena in that they are the result of human action, including of course rational human action. But it remains a fact that Hume did not work out such a theory, although he virtually stated the idea, as we have seen, and although he had a superb example of this third category in his idea of justice.³⁴

In a couple of comparisons Hume is again in effect pointing out that justice, as an artificial phenomenon, has a rather special status in this world - but again without saying the decisive things. He compares property with "the imaginary qualities of the *peripatetic* philosophy", and then points out that the only difference is that property

is able to cause moral approval - and it is only able to do so, because it serves a certain function. (T. 527-28) And in the *Enquiry* he compares justice and various "vulgar superstitions"; with the result that the former "is absolutely requisite to the well-being of mankind and existence of society", whereas the latter "is frivolous, useless, and burdensome". (E. 199)

It is clear that what really impressed Hume in what he took to be artifices, was their goal-directedness, the fact that they had a certain function. Now, if we take this fact; plus the fact that the traditional conception of artifice was that it involved some kind of constructive reason; plus the further circumstance that for Hume "the intervention of thought and reflexion" did in fact play a decisive role in the origination of justice - although *not* as constructive reasoning aiming at rules of justice, but *only* as the "vulgar sense and slight experience" which is sufficient to restrain and re-direct the interested passions of self-love and confined benevolence in concrete situations; if we take all those facts together, I think it becomes somewhat more intelligible why Hume fairly frequently slipped from the evolutionary theory of justice, which we presented above, into the indications of a rationalistic view.³⁵ The troublesome concepts are those of reason, goal-directedness, and utility. The level of reason involved in the origin of justice is low, but its operations *result* unwittingly in an institution which looks as if it had involved a very high level of rationality because it is directed towards a certain goal in the sense that it has a definite function. The individual actions in which justice originates have one conscious end, namely a safer satisfaction of the "interested passions", i.e.

self-interest, but they result in the rules of justice which have *public* interest (or utility) as their "end". And this public interest of course comprises each individual's private interest; but *qua* public interest it could originally be nobody's aim and, indeed, it is properly nothing but a "natural tendency".

I suggest that it is the failure to keep those tangled relationships quite clear (plus the lack of clarity about the natural/artificial distinction) that in some individual cases leads Hume to say things that are patently inconsistent with his theory of justice. I will take the more obvious cases:

"The whole scheme ... of law and justice is advantageous to the society and* to* every* individual*, and 'twas with a view to this advantage, that men, by their voluntary conventions, establish'd it."

(T. 579) But surely men could not have had the *public* advantage in view beforehand - only the individual (so it seems a little significant that Hume in the margin added the bit about individual advantage).

In discussing the moral character of justice, Hume adds the following:

"Now justice is a moral virtue, merely because it has that tendency to the good of mankind; and, indeed, is nothing but an artificial invention to that purpose." (T. 577)

And elsewhere: "These rules [of justice] ... are artificially invented for a certain purpose." (T. 532-

33) Here the same comment applies as above.

Finally, in the *Enquiry* appears what is nearly the most rationalistic-sounding passage of all - and exactly in Hume's discussion of in which sense justice is artificial:

"Natural may be opposed, either to what is *unusual*, *miraculous*, or *artificial*. In the two former senses, justice and property are undoubtedly natural. But as they suppose reason, forethought, design, and a social union and confederacy among men, perhaps that epithet cannot strictly, in the last sense, be applied to them." (E. 307-308. note).

It is rather difficult to square "reason, forethought, design", as well as the previously quoted long-ranging views and purposes, with that "vulgar sense and slight experience", that "least reflection", which we otherwise meet in Hume when he is concentrating on the origin of justice.

If we turn our attention to the closely connected problem of where public interest (or utility) comes in, we will also find the occasional confusion: is it actually part of the original motivation for instituting justice, or is it only a "natural tendency" of justice, once established? Thus Hume says quite clearly,

"that 'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin." (T. 495)

But only half a page later he allows unclarity to slip in:

"'Twas therefore a concern for our own, *and the public interest*, which made us establish the laws of justice".

(T. 496)

Equally he declares at the outset of his Section 'Of Justice' in the *Enquiry* that he wants to show "that public utility is the *sole* origin of justice". (E. 183)

There can, however, hardly be any doubt that passages such as these are the result of carelessness, for elsewhere Hume is perfectly clear about the relation between private and public interest in his theory; e.g.

"Thus self-interest is the original motive to the *establishment* of justice: but a *sympathy* with public interest is the source of the *moral approbation*, which attends that virtue. This* latter* Principle* of* Sympathy* is* too* weak* to* control* our* Passions*; but* has* sufficient* Force* to* influence* our* Taste*, &* give* us* the* Sentiments* of* Approbation* or* Blame*." (T. 499-500)

It is here disclosed that public interest comes in when Hume accounts for the moral quality of justice - a theory which we have yet to describe - while private interest is reaffirmed as the force behind the origin of justice.

All those occasional tensions between Hume's evolutionary theory of justice and various rationalistic ideas do, I think, in the end stem from the difficulty I mentioned at the outset of this discussion:³⁶ on the one hand Hume can only recognize justice as justice in the form of absolutely general rules, for if there were any exceptions, the system would break down. But on the other hand, if justice is created piecemeal by individual actions and imitation of such actions, then an intermediate state must be possible where individual acts, that are later recognized as being just, are able to gain ground *without* justice existing in the form of general rules, for those rules are the *outcome* of the individual acts of that particular kind gaining ground.



We are thus referred back to the individual actions that lie behind the origin of justice. Hume took these to be the acts of *re-directed* self-interest (self-love and confined benevolence), but has not been able to show that people would actually be able and willing to imitate such "enlightened" self-interest - except on the implausible presupposition that virtually everybody at once did so. In other words, if the whole evolutionary theory is to function properly, some kind of change must be made in the explanation of the actual behaviour that unintentionally leads to establishment of justice - and that is, as we will see later, exactly Adam Smith's achievement.

Section 6. Property

Hume has tried to account for the origin of justice by means of the idea of external possessions. Originally justice is, as we now understand, the kind of behaviour men exhibit when they keep away from the possessions of others. This renders these possessions a certain stability, and stable possessions protected by justice is what we call property. Thus the idea of justice gives rise to the idea of property. (T. 490-91) The question is, however, *which* possessions are turned into property under the protection of justice. In his usual dialectic way, Hume only reaches his own conclusion by way of a couple of impossible alternatives: Since the ultimate justification for the rules of justice, as we will see later, is the kind of public utility which is able to call forth our moral approbation, it might be thought that the possessions which justice protects, and thus turns into property, would be those which would yield the maximum public use, i.e. those in the hands of men who would be best suited to use

them for the common good. (T. 502, E. 192-93) But this cannot possibly be the case; for first of all it is not an unequivocal criterion which would single out a particular person for particular pieces of property; and secondly, men's ideas of who are fit for what possessions are

"liable to so many controversies, and men are so partial and passionate in judging of these controversies, that such a loose and uncertain rule would be absolutely incompatible with the peace of human society" (T. 502),
and thus with the very "purpose" of the rules of justice.

The second possibility that Hume considers is that "real" justice only protects possessions when they are *equally* distributed among men, such as the Levellers claimed. (E. 193-94) But this is also impossible. First of all, men are by nature so different that even if equality had at some point been reached, inequality would immediately crop up again. And secondly, as far as the origin of justice is concerned, one could not imagine anyone having the sufficient power to distribute property equally. And as to the normative side of the Levellers' doctrine, it would be highly dangerous to try and make a reality of it, for it would inevitably require a tyranny. (E. 194)³⁷

The outcome of Hume's discussion of this point is, then, that the possessions which justice is introduced to protect cannot be required to be redistributed in any way, for that would require a power which nobody in fact can have, and/or a unanimity which is not present. And if anybody tried to act on the opposite assumptions, it would wreck the possibility of a social formation.

Hume's own solution is that the introduction of justice cannot possibly do more than ratify *de facto* possession. (T. 503) Apart from the negative arguments given above, Hume points out that men are slaves of habits and custom, so that they develop a greater affection for what they in fact have in their possession than for anything else. And this makes it rather obvious for them to expect the rules of justice to protect this *de facto* possession. In a long footnote he makes his meaning a little clearer. Although there are "motives of public interest for most of the rules which determine property" (T. 504) and although, as we know, "vulgar sense and slight experience" (E. 195) is enough to give men such motives, Hume still finds reason to "suspect, that these rules are principally fix'd by the imagination, or the more frivolous properties of our thought and conception". (T. ib.) And he then goes on to invoke his principles of association, pointing out that the relation between a man and his possessions is such that the mind naturally tends to connect them, and the new relation called property is therefore nothing but an underpinning of an already existing relation:

"* As property forms a relation betwixt a person and an object, 'tis natural to found it on some preceding relation; and as property is nothing but a constant possession, secur'd by the laws of society, 'tis natural to add it to the present possession, which is a relation that resembles it."

(T. 504-505, note; and cf. E. 195-196)

Present possession is thus the circumstance that explains the original emergence of property through the introduction of the rules of justice, and it remains also in developed society one of the sources of

property. Hume then calls it occupation. (T. 505-507) But as he points out (T. 505), this is obviously too impracticable and inflexible a rule to be the only source of property in a changing and developing society, and the principles of prescription, accession and succession therefore naturally develop. In all these the rules have a background in the natural operation of the imagination, but what the imagination yields is frequently rather vague and contradictory from case to case, and there is thus bound to be a strong element of arbitrariness in such rules. Where obvious analogies or considerations of utility fail, civil law comes in and supplements natural law. (E. 196)

In those short sketches it is clear that Hume is not only concerned with explaining some fundamental principles underlying law as it is found in present society. He is quite as much interested in showing that, given man's nature and situation, fundamental law must be a phenomenon with an evolutionary background. For the reasons already given, some kind of stability of possession must be developed. This in itself gives rise to a new situation which requires the articulation of this fundamental rule in the more specific rules about prescription etc., which again requires interference by civil law and statutes. In the same manner necessity and convenience naturally lead to the rule about the transference of property by consent, (T. 514-516, E. 195) and to the institution of promises and contracts. (T. 516ff., E. 195)

Section 7. Promises

In the *Treatise* Hume makes a special study of promises, the aim of which is to show that just like "justice in general" (T. 518) promises constitute an artificial institution, and that the attendant virtue of keeping one's word is in that sense an artificial virtue. This is an extremely important discussion, for it is one of the few clues to Hume's views on obligation, and thus to the moral quality of the laws of justice in general, i.e. their character as natural law.

Just as in the case of justice, Hume begins by pointing out that there is no natural motive to keep promises. (T. 516-18) The general motive is a sense of duty or obligation, but that presupposes a promise by which the obligation is incurred. (T. 518) What precisely this means cannot be seen till we come to treat Hume's theory of obligation below. Till then we must take it as a premise for his further argument, which is that we will first have to explain how promises can emerge as a social institution, and then show how our moral obligation to keep promises arises out of that.

His account of the emergence of promises is closely parallel to his account of how the fundamental law of justice arose, as he himself points out. (T. 519) On the one hand the reign of the interested passions over men's minds makes it very difficult for them to come to trust each other. (T. 519-20) But on the other hand their situation is such that it is rather necessary for them. For although they may have developed a certain stability of property, and even the idea of transferring it by consent, it will still not be possible for them to transfer such property as is "*absent or general*" without the institution

of promises and contracts .

"One cannot transfer the property of a particular house, twenty leagues distant; because the consent cannot be attended with delivery, which is a requisite circumstance. Neither can one transfer the property of ten bushels of corn, or five hogsheds of wine, by the mere expression and consent; because these are only general terms, and have no direct relation to any particular heap of corn, or barrels of wine." (T. 520)

And equally the exchange of services is impossible. (T. 520-21)

Under the pressure of this situation, individual men will in particular situations see the advantage of taking the risk of trusting another man, and this other man will very likely see it as in his interest to prove himself trustworthy. For if he does not, he cannot expect ever to be trusted in the future and he would therefore cut himself off from a co-operation that is necessary for him. This danger arises because promises have to be expressed and this verbalisation of one's resolution makes it public:

"When a man says *he promises any thing*, he in effect expresses a *resolution* of performing it; and along with that, by making use of this *form of words*, subjects himself to the penalty of never being trusted again in case of failure." (T. 522, and cf. E. 199-200, note)

It is thus not the resolution that creates a promise, for that is just our natural motive. It is the use of signs, or expressions, to publicise the resolution that creates the promise³⁸ because it creates a new motive, namely the fear of not being trusted by our fellow men in case of non-performance. And as the signs used are artificially

invented by men, we see that promises are artificial phenomena as well. (T. 522)

Just as in the case of justice there are certain rationalistic elements in Hume's much shorter account of the origin of promises. Thus he talks of the "institution" of promises and he clearly thinks of promises as created deliberately for a certain purpose. But on the other hand he stresses that the purposefulness and deliberation is of the very low rationality sort which only arises in concrete situations.

(T. 522) And it is also clear that the emergence of promises is just another step in the gradual articulation of the laws of justice, for it is only the logic of situations where property already exists and where slightly more complicated social relations are under way, that creates a real need for the institution of promises. It must, however, be made quite clear that in his treatment of the origin of promises, Hume does not give us the kind of clarifying comments that he does in connection with the origin of justice about the relation between men's *intentions* and the overall *result* of their actions.

What we would have expected him to point out is that men unwittingly create a new institution when they sufficiently often, in individual instances, out of self-interest take the chance of trusting their neighbour's word, and that this new institution is such that it automatically creates a new self-interested motive for keeping one's word, namely the fear of "never being trusted again in case of failure".

Although he never says this explicitly, it is clear that he has all the materials for saying so. And on the background of what he does say in the parallel case of the origin of the fundamental idea of justice, there can hardly be much doubt that this would be his opinion, if challenged on the point.

Section 8. Obligation

As we noted at the beginning of the present treatment of Hume's theory of justice, this theory is really made up of two parts: a theory of the origin of justice, and a theory of the moral quality of justice. So far we have only dealt with the former. Not until we have gone through the latter and seen how it is integrated in Hume's general account of moral evaluation, will we be in a position to appreciate how important the fundamental division of the theory of justice into the two parts is.

Hume's general theory of morals is mainly concerned with explicating moral good and bad, virtue and vice. And so it is not surprising to find that when he, at the end of his Section 'Of the origin of justice and property' in the *Treatise*, turns to the question of the moral quality of justice, he formulates it as "Why we annex the idea of virtue to justice, and of vice to injustice". (T. 498) He does, however, have a theory of obligation as well, which is completely in line with his general theory. And although he does not say very much about it it is both so clear and so important that I think it most convenient to approach his ideas of the moral quality of justice (including promises)³⁹ through it.

Hume opens one of his most important paragraphs on obligation by stating the principle that ought implies can:

"No action can be requir'd of us as our duty, unless there be implanted in human nature some actuating passion or motive, capable of producing the action." (T. 518)

We can only be under an obligation to do actions the motives for which are within the range of natural human motivation. He then goes on to

spell out what this means for our idea of obligation:

"This motive cannot be the sense of duty. A sense of duty supposes an antecedent obligation: And where an action is not requir'd by any natural passion, it cannot be requir'd by any natural obligation; since it may be omitted without proving any defect or imperfection in the mind and temper, and consequently without vice." (T. ib.)

In other words, we have an obligation to perform an action,

1) if the motive for this action is a natural human motive (this is the principle that ought implies can, and it is a necessary condition for obligation), and 2) if our non-performance of the action is a sign that we are missing a quality in our character (and consequently a motive for the action) which it is a "defect or imperfection in the mind and temper" to be missing. What Hume means by "defect or imperfection" is strongly indicated on the previous page:

"All morality depends upon our sentiments; and when any action or quality of the mind, pleases us *after a certain manner*, we say it is virtuous; and when the neglect, or non-performance of it, displeases us *after a like manner*, we say that we lie under an obligation to perform it." (T. 517)

The imperfection, of which the non-performance of an obligation is a sign, is thus a quality which is subject to a certain kind of displeasure, namely a displeasure which is similar to the pleasure which accompanies our perception of virtue. But now we know from Hume's general exposition of the emotional background to moral evaluation, that this latter pleasure arises in conjunction with a peculiar indirect passion which is closely akin to, and in a way nothing but a corrected

version of, love and which we call moral approbation.⁴⁰ And this, of course, leads us to expect that the displeasure in question here arises in conjunction with the indirect passion which is akin to hatred and is known as moral disapprobation.⁴¹ That this is what Hume intends is strongly supported by a short treatment of obligation much earlier in the *Treatise*:

"When any virtuous motive or principle is common in human nature, a person, who feels his heart devoid of that principle*, may *hate himself* upon that account and may perform the action without the motive, from a certain sense of duty,...". (T. 479, my ital.)⁴²

If we put all those pieces together, we can see fairly clearly what Hume's theory of obligation was. Obligation has to be seen on the background of the natural and common qualities of human character and the accompanying motives. If a man either lacks a certain quality, or in a particular situation does not have the common or natural motive, he may yet perform the action which this quality and motive would have lead him to do if he had had it. For he may see that if he looks upon the situation as men commonly and naturally do, i.e. as an impartial spectator, then he will come to hate himself, in the sense of disapprove of himself, if he does not perform the action. Whereas, on the other hand, he will be pleased with, i.e. approve of, himself if he does perform. And in this consists the sense of duty:

"A man that really feels no gratitude in his temper, is still *pleas'd* to perform grateful actions, and thinks he has, by that means, fulfill'd his duty." (T. 479) And "Tho' there was no obligation to relieve the miserable, our humanity wou'd lead us to it; and when we omit that duty, the

immorality of the omission arises from it being a proof, that we want the natural sentiments of humanity. A father knows it to be his duty to take care of his children: but he has also a natural inclination to it. And if no human creature had that inclination, no one cou'd lie under any such obligation." (T. 518-19)

It will be noticed that I have above interpreted Hume's obligation as making up for motives which are natural and *common*. This latter description was used to indicate Hume's view that the natural principles in the human mind have conventional expressions and that these can vary from time to time, and from place to place.⁴³ In this way it becomes possible for him to reconcile the idea of a basically uniform human nature with the facts of historical and geographical differences.⁴⁴

Also, we must not be led to believe that the regard to what is natural and common in our idea of obligation makes obligation the same as respectability. Although our idea of obligation is *formed* under social pressure, it only becomes moral obligation proper when the situation is viewed objectively and impartially - exactly as in all moral evaluation in Hume. This is a vital step in Hume's argument, but its full import can only be appreciated after we have analysed the role of history, and the idea of utility.

What we have presented so far is, however, only part of Hume's theory of obligation. For it is evident that as the theory stands above, it can only explain how a sense of duty can make up for natural motives, and thus why we have an obligation to perform natural virtues. But what we are particularly interested in is the obligation to perform

artificial virtues. One can formulate the problem about these virtues in the following way. There are no natural motives to perform them, i.e. no motives which do not presuppose their existence as social practices, as we have seen. But this means that the non-performance of them does not indicate any natural "defect or imperfection in the mind and temper". Accordingly one does not naturally come to hate oneself for not performing them, and therefore there does not naturally arise any sense of duty to perform them. It is this situation which forces Hume to embark upon his detailed theories of how the rules of justice (including the institution of promises) emerge from men's individual, self-interested actions and how they, once in existence, are maintained through the same (but redirected) self-interest. And from this basis he is to explain how we come to attach a moral value to them. We can thus see how the whole plan is well suited to convey the idea of justice as something *developing*, as a *natural* growth, in the sense that it is non-arbitrary and has natural causes in man's nature and situation; and as an *unintended* growth, in the sense that it is not rationally planned in any of the major turns of its development.

How do people come to hate themselves - and, of course, others - for not acting in accordance with the rules of justice, and thus to develop a sense of duty on top of the interest they have in such behaviour? In one central paragraph Hume invokes his principle of sympathy. He first points out that as society grows larger, the self-interested motive to observe the rules of justice grows fainter for the individual, where his own matters are concerned: a single exception to a so wide-ranging rule does not seem to do much harm. But this tendency

is countered by the sympathy we have with others when they are being treated unjustly by some third person, as well as by the resentment we feel when we ourselves are the subject of injustice (this latter could, of course, be construed as spectator-sympathy with ourselves):

"Tho' in our own actions we may frequently lose sight of that interest, which we have in maintaining order, and may follow a lesser and more present interest, we never fail to observe the prejudice we receive, either mediately or immediately, from the injustice of others; as not being in that case either blinded by passion, or byass'd by any contrary temptation. Nay when the injustice is so distant from us, as no way to affect our interest, it still displeases us; because we consider it as prejudicial to human society, and pernicious to every one that approaches the person guilty of it. We partake of their uneasiness by *sympathy*; and as every thing, which gives uneasiness in human actions, upon the general survey, is call'd Vice, and whatever produces satisfaction, in the same manner, is denominated Virtue; this is the reason why the sense of moral good and evil follows upon justice and injustice." (T. 499)

By and by those individual cases of sympathy, and consequent moral approval/disapproval of just/unjust actions, grow into a general rule which "we fail not to extend ... even to our own actions". And this extension is supported by the fact that "we naturally *sympathize* with others in the sentiments they entertain of us". (T. ib.) With this last point Hume is undoubtedly thinking of our ability to become spectators of our own actions and thus to come to evaluate them (or, rather, their

motivation) by sympathy with their effects (or, more correctly, their tendency). All this seems very clear and we readily allow Hume to draw his general conclusion:

"self-interest is the original motive to the *establishment* of justice, but a sympathy with public interest is the source of the *moral approbation* which attends that virtue."

(T. 499-500)

But if we ask how we are to get the moral *obligation* to justice out of this account, we get into difficulties. For exactly *what* motive is missing if we behave unjustly? What motive do we come to hate ourselves for not having? It cannot be the sympathy with public interest, for sympathy is nothing but a principle of communication and not a motivating force, as we have seen.⁴⁵ The obvious answer is that the motive is the one which we come to approve of through sympathy with its effect (or tendency). Now, the effect (or tendency) is the public interest. But the motive? Well, as long as the sense of duty is not established yet the only motive is self-interest. But as we know that the motive is only taken as an indication of a quality of character when we evaluate morally, and as it is hardly likely that Hume thought self-interest, as a general character trait, morally approved by men (which, of course, does not entail that it is generally disapproved); the conclusion must be *that there is no motive* which we could come to hate ourselves for not having. It thus seems as if Hume fails to give us the motive which could form the link between the interested motivation for just behaviour and the moral obligation to such behaviour. He does, however, not fail us completely. For if we turn to his treatment of promises again, we will find sufficient

indications to allow us to fill in what is missing to make the theory coherent:

"The difficulties, that occur to us, in supposing a moral obligation to attend promises, we either *surmount or elude*. For instance; the expression of a resolution is not commonly suppos'd to be obligatory; and we cannot readily conceive how the making use of a certain form of words shou'd be able to cause any material difference. Here, therefore, we *feign* a new act of the mind, which we call the *willing* an obligation; and on this we suppose the morality to depend." (T. 523, first italics mine)⁴⁶

If we draw in what we know from the case of justice, we can put the following interpretation upon this. When promising, motivated by self-interest, becomes a regular behaviour and when we through sympathy with its beneficial tendency come to approve of this behaviour, then the natural tendency in men to see behaviour as an expression of motives and motives as expressions of qualities of character, leads them to *imagine* that there is a natural motive (and thus a character trait), namely the willing of an obligation, behind promises. And it is thus this *imagined* motive they, through sympathy, come to approve of. And when they find that they, for very good reasons, do not have this motive themselves, they come to hate themselves, and this self-hatred creates the sense of duty to fulfil their promises. Or in other words, certain actions done out of a morally *neutral* motive (self-interest) have on the whole so good consequences and seem so clearly aimed at those consequences, that men naturally come to imagine that there is a specific motive for the

actions which directs them towards those consequences. They naturally come to approve of this non-existing motive and to hate themselves for not having it. And this self-hatred is the magic formula, for it constitutes the real moral motive to do justice and fulfil promises, viz. our sense of duty.

Let me stress that this suggestion about the imagined motive is a construction of mine. I put it forward for the following reasons.

1) It is needed at a vital turn in Hume's argument, namely the development of moral obligation out of interested motivation. 2) There is the quoted indication of such a view - and it seems quite a strong indication, when read in this context. 3) The idea is in line with Hume's general position, that moral approbation is about motives and through them about persons. 4) And it is in line with his general idea of obligation as self-hatred for lack of a motive.⁴⁷

Section 9. Two Difficulties

The whole preceding account of the moral value and obligation of the artificial virtues in general and of justice in particular makes one significant presupposition. It is taken for granted that Hume's theory can account for how we sympathize with those who benefit from the useful tendency of these virtues, once they have been established as social institutions in the way described earlier. But it seems to me that this is precisely what Hume's theory is not able to do. It is self-evident from Hume's description of the sympathy mechanism that we can only have sympathy with specifiable individuals. It may be virtually any man, however strange, but it has to be a concrete,

individual man. But this condition is clearly not fulfilled with the artificial virtues, and particularly not justice. Here the usefulness is for a group (even an open-ended group) of non-specific persons, and it may not even be present for those of them whom one knows as concrete persons. This in a way is the whole point in the distinction between the natural and the artificial virtues: whereas the former are useful in each individual case, the latter need not be.

This failure in the theory of sympathy to provide a necessary step in the theory of moral evaluation is not only of significance in itself. It also seems to me to be the most obvious reason Hume could have for leaving the technical concept of sympathy behind when he came to write the second *Enquiry*, and instead bring in the broad concept of fellow-feeling which "solves" the problem in that it does exactly not require the concreteness of object which the sympathy of the *Treatise* does.

As indicated in the first Section of the present Chapter, this difficulty - serious as it is - should therefore hardly be taken as a more or less complete breakdown of Hume's original theory of the connection between the passions and morality, but rather as the occasion for renewed speculation. And the *Enquiry* constituted some such speculation.

Whether Hume was content with this speculation we do not know, but Adam Smith was not. Although we do not have direct evidence for this, I suggest that it is a fruitful perspective on Smith to see his ideas of situational propriety, which we will discuss in the following Chapter, as an attempt to connect the two strands of Hume's theory of

justice, the origin of justice and the moral value of justice, into one theory and thereby solve the difficulties in each of these two parts. The difficulty in the former part, the origin of justice, is the one we pointed out at the end of Section 5 above, viz. that Hume fails to spell out the details of how the spread of just behavioural practice is psychologically possible. And the difficulty which Smith saw in the latter part of the theory, the moral value and obligation of justice, can, I suggest, be formulated as the following dilemma. Either moral value and obligation have to be accounted for in terms of sympathy (*Treatise* solution), but that requires a concreteness of object which is just not present in the case of justice in the "anonymous" society, i.e. the society beyond the family group; or they are accounted for by means of "fellow-feeling" (*Enquiry* solution), which avoids this difficulty, but which is so optimistically forward looking, and in that sense rationalistic, that it is not to be found in ordinary men, but is rather a philosophers' speculation. How Smith retained the concreteness of the *Treatise* without running into Hume's difficulties, and how he thus avoided the second horn of the dilemma, the excessive reliance on the "tendency of affections" (TMS, I, i, 3, § 8), will be part of the theme for the next Chapter.

Section 10. The Role of History

"Men are mightily addicted to *general rules*" (T. 551), "they cannot even pass each other on the road without rules", yes, "it is impossible for men so much as to murder each other without statutes, and maxims, and an idea of justice and honour." (E. 210-11) This ability and

tendency to create rules by following a uniform pattern of behaviour is a basic feature of human life, and we have now seen how it gives rise to some of the most important rules of all, namely the fundamental "laws of nature". These laws are not in any way *derived* from statements about human nature, they are *caused* by certain elementary features of human nature, when the latter is placed in a world like the present one. And because men have an ability to balance long term interest against short term interest, they come to be bound by the rules they themselves happened to bring into being and the rules, therefore, in a sense win a certain independent status. This is further increased when the rules get a moral quality. This moral quality is also not "derived" in any mysterious sense from descriptions of man's nature. It consists of a set of indirect passions, which men (in contrast to animals: T. 326) have a natural ability to come to feel when they are exposed to certain causal circumstances. What Hume is proposing is, therefore, an (intendedly empirical) hypothesis about a possible sequence of causes and effects, the end-result of which is far beyond the plans and intentions that any individual could have. As laws they are laws without a legislator. As social institutions they carry all the marks of being an "artificial invention" in spite of their wholly "natural" causes. They are universal, or general, in the sense that they do not allow of any exceptions. They are thus "impersonal", because they do not take into regard the individual merits in a given case. (T. 531-32) Which is again just another way of saying that they do not allow of any overriding values - a point to be explored more closely below. The same is shown by the fact that they, unlike the natural virtues, do not allow of any degrees. They

are absolutely precise and sharp and "property, and right, and obligation [and therefore justice] admit not of degrees". (T. 530; see the whole paragraph pp. 529-31) The result of following these rules is the establishment of an over-all order, called society. For justice and society are coinciding (T. 492-93), yes, justice is "of all circumstances the most necessary to the establishment of human society." (T. 491)

It is difficult to understand Duncan Forbes's remark that if

"Hume caught a glimpse of a very real alternative:
order coming into things without the deliberate construction
of some mind ... , he did not carry this insight into
social philosophy".⁴⁸

For it would seem that his whole theory of justice is a major example of just this insight, as I have argued above. And, as Forbes himself so excellently points out, it is in his social philosophy that Hume is more Newtonian than the Newtonians in ruling out all talk of final causes and in insisting on a clear "bracketing off of the natural from the supernatural".⁴⁹ Nevertheless, Forbes is quite right in cautioning us not to read a thoroughgoing social evolution into Hume's texts and see this as the central thing for him.⁵⁰ And he is equally right in insisting that Hume "still subscribed to the classical idea of the Legislator creating social order out of chaos"⁵¹ - provided we, with Forbes,⁵² understand "chaos" as still a social situation, and not any kind of state-of-nature situation. For in reminding us of those two points, Forbes forces us to face two decisively important questions. What is the relation between Hume's theory of justice, as stated above, and historical evolution? And what is the relation of justice to other

values that men could invoke - or in other words, in what sense is justice a fundamental law for men?

I have argued that Hume's conception of justice was evolutionary, but this must not be understood to mean that he put forward a theory of how justice did in fact evolve. His argument is firmly rooted in his theory of human nature. But on the basis of this he shows that justice is such a kind of phenomenon that it must necessarily have an evolution behind it. In a way his argument could be said to be negative: he tries to show that justice is neither the effect of a separate faculty in the human mind, nor a deliberate construction of human reason, and he does this by showing that it is a necessary by-product of men's natural responses to their situation in the present world. He is thus not writing the history of justice, but he is showing that given the ever-present features of human nature (self-love and confined benevolence) and the equally universal features of the world (relative scarcity), justice must have a history and this history must be a purely natural one. But the theory does clearly not say anything about what course this development takes in particular cases.⁵³ Thus not only the question of who owns what is contingent, (T. 502) but one would also imagine that the very idea of what *kind* of things could count as property would be variable and subject to development.⁵⁴

The same point, that Hume's theory is of such a design that it fairly clearly points out the place of history, without itself being a historical theory, is brought home to us when we attend to the moral quality of justice. This arises through sympathy from the utility of just acts, as is the case with all the social virtues. (E. 214-15) But

if we look at this concept of utility, it turns out to be more a framework or principle than a concept with a concrete content:

"Usefulness is agreeable, and engages our approbation.

This is a matter of fact, confirmed by daily observation.

But, *useful*? For what? For somebody's interest, surely.

Whose interest then? Not our own only: For our approba-

tion frequently extends farther. It must, therefore, be

the interest of those, who are served by the character

or action approved of." (E. 218)

But obviously this interest is extremely variable, and the concept of utility must be equally so. This is a rather important point, for it shows the room for improvement in morals and thus the role of knowledge. The better people understand human nature and its situation, the better will they be able to see what men's true interests are (given their basic passions of self-love and confined benevolence), and to evaluate accordingly. One of Hume's finest examples of such revaluation in the light of improved knowledge is the case of luxury:

"Luxury, or a refinement of the pleasures and conveniences of life, had long been supposed the source of every corruption in government, and the immediate cause of faction, sedition, civil wars, and the total loss of liberty. It was an object of declamation to all satirists, and severe moralists. Those, who prove, or attempt to prove, that such refinements rather tend to the increase of industry civility, and arts regulate anew our *moral* as well as *political* sentiments, and represent, as laudable or innocent, what had formerly been regarded as pernicious and blameable." (E. 181)⁵⁵

We must agree that

"Hume's 'general psychology' is concerned with the function and mechanism, not the content of mind, which is various and supplied by social and historical circumstances."⁵⁶

And this conclusion allots philosophy, criticism (in the broad, Humean sense), and history their proper functions. What I have been concerned with is to show *how* the "general psychology" itself leads to a demand for historical evolution in the case of justice. Whether Hume's historical and "sociological" writings fit the bill is not part of my proposed problem in the present thesis.

Section 11. Utility and Natural Justice

We have already been brought a long way into the second large problem that was suggested by Duncan Forbes, namely in what sense justice is a fundamental law for men. There are certain difficulties with such an interpretation which we must now face. We know that justice gains its moral character through sympathy with its utility and that this leads Hume to maintain that the force of the obligation to be just tends to be proportional to the utility. This clearly indicates that justice is not so fundamental that it cannot be overruled by other values. And it thus appears that Hume comes down firmly on the side of utility, with justice as more or less an epiphenomenon, a mere function of utility. The matter is, however, much more complicated than that. For we must remember that the utility in question is the *public* utility, which on an enlightened view comprises each individual's private utility and which the individual takes part in by means of

sympathy. This means that justice can only be overridden if it is no longer of public use. But as justice is the very cement of social life, this can only happen in the most extreme cases where society is threatened with dissolution from "external" pressures:

"Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property? Or if a city besieged were perishing with hunger; can we imagine, that men will see any means of preservation before them, and lose their lives, from a scrupulous regard to what, in other situations, would be the rules of equity and justice? The use and tendency of that virtue is to procure happiness and security, by preserving order in society: but where society is ready to perish from extreme necessity, no greater evil can be dreaded from violence and injustice; and every man may now provide for himself by all the means which prudence can dictate, or humanity permit." (E. 186. Cf. e.g. the parallel case of international law, T. 567-569)

In other words, only where the public interest cannot be affected can other motives, like prudence or humanity, take over from justice. The connection between the general rules of justice and the public utility they create is so close that only in very few circumstances does it allow of exceptions. But the connection is obviously an empirical matter, or at least that is Hume's intention, and the task for his philosophical politics is to show men this connection. With a better understanding follows a stronger obligation and in this way

Hume's new science fulfils much the same function as political propaganda and parental indoctrination (cf. T. 500-501, E. 214) for those who can understand it. And these latter become the "moderate men" in whom Hume invested so much hope for the future. Only when men are not so informed do they become "a kind of political fanatics", like the levellers (E. 193), and start acting against the laws of nature on the basis of their own evaluations.

If we now look closer at the kind of utility that is involved, i.e. the public utility, we will see that Hume's view also on this point is rather complicated and unusual. When he presents his account of how justice gains its moral quality, he does so by showing how *injustice* is a vice. (T. 499) Men have a strong tendency to sympathize with the effects of injustice and accordingly to disapprove of it. Implied in this is, apparently, that just behaviour is what is left when injustice is ruled out. Justice is, so to speak, a negative virtue and "We may often fulfil all the rules of justice by sitting still and doing nothing", as Smith was later to express the idea. Only when justice is done under difficult circumstances do we directly and actively approve of it as more than the absence of injustice. This negative form of the rules of justice means that they in a way only say something about what is *not* to be done: don't infringe on anybody else's property; don't break promises, etc., but nothing is said about the rights that are protected in this way. The property and the contract that are protected and only exist by means of the rules of justice can be used for any purpose one wants, as far as justice is concerned. And of course such actions can be subject to further general moral evaluation, but that is outside the scope of justice. Now this means

that the interest that justice promotes and protects is not any concretely specifiable one. It is simply the sum total of individual interests that are compatible within a society, i.e. which are not unjust. And *this* is the public interest (which, through sympathy, is the ultimate cause of our moral approval of justice):

"as the self-love of one person is naturally contrary to that of another, these several interested passions are oblig'd to adjust themselves after such a manner as to concur in some system of conduct and behaviour. This system, therefore, comprehending the interest of each individual, is of course advantageous to the public".

(T. 529)

This again means that the laws of justice are *useful* in the sense that they serve as a *means to an end*, the ends being the public interest. But this idea of "means-utility", as we could call it, is clearly different from the idea of utility which we find in the later utilitarian theorists. For them utility is more or less identified with pleasure or happiness of a kind, and it is thus the *end* towards which actions should aspire.

This distinction between means-utility and end-utility is extremely valuable,⁵⁷ but it is very doubtful how clearly Hume himself saw it. If we stick narrowly to the way in which he uses the concept of utility, it may appear as clearly the means sense. When he talks of the public interest as useful to the private, the content of the latter is clearly irrelevant. It may, of course, be pleasure or happiness; but that is another matter which lies outside the utility-justification of justice. For as far as justice is concerned, all

that can be said about the individuals' ends is that they must be compatible, i.e. that they are not unjust: that is the public interest.

And it is not just in connection with justice that Hume uses the means sense of utility. When we morally approve of a character trait because of its tendency to promote the interests of another person, in the way described above,⁵⁸ this is clearly means-utility.

"Usefulness is only a tendency to a certain end."

(E. 219)

And it is obviously this means-utility which makes possible the "correction" of our impressions, so that we as "a judicious spectator" can judge morally, i.e. impartially, about our servant as well as Marcus Brutus, and aesthetically, i.e. impartially, about the fortifications of any city.⁵⁹

But all this clarity is rather blurred by Hume's constant reference to the happiness which these various "means" tend to create. There is, of course, nothing wrong in talking of means and ends together. But in the absence of a direct clarification of the concept of utility it does make one wonder how clearly Hume saw the consequences of his dual uses of it. And when we come to deal with Adam Smith we will still be kept wondering about this problem.

In view of the strong presence of the means sense of utility it is, however, clearly misleading to say that Hume's moral theory in general, and his theory of justice in particular, is utilitarian, for this label is unambiguously connected with the end-utility of Bentham and the Mills. For Hume the moral justification of justice, or the cause

of our approval of it, is that it creates a "system of conduct or behaviour" which allows the optimal pursuit of individual interests which is compatible with living together in a society. Exactly what relevancy the content of these individual interests has for his argument is the doubtful point.

But it must be stressed that this does not preclude that we can give further moral evaluations of just acts, for all those individual interests which pass the test of justice, i.e. which are not unjust, may cause all sorts of other moral feelings. We may thus find that although an action is just, in that it does not transgress the laws of justice, it is yet wanting in benevolence, or, on the contrary, that an action is unjust, and yet humane. But the point is that such further moral evaluations are irrelevant as far as justice is concerned and therefore outside the law, because they do not affect the public interest as this has been defined above. Only when the public interest is out of the picture, "where the society is ready to perish from extreme necessity" (E. 186), can other moral and non-moral evaluations replace justice.

When is an action then just, according to Hume? The simple psychological answer is, when it is the expression of a character trait which on the whole has a tendency to be useful as a means towards another person's interests which we can appreciate through sympathy. But in a way the circumstances under which this sympathy can take place is the really important and interesting thing. It can only take place from an impartial point of view, i.e. it must not be dependent upon the particular persons involved. But this again is tantamount to

saying that the action must be in accordance with a general rule: anybody should be able to be willing to do it. This is, however, just another way of saying that the action, or at least the motive behind it, should be compatible with the highest possible number of other aims in the society or group concerned, otherwise not "anyone", or as near as possible to "anyone", would be able to be willing to do the action. This is the significance of our "correcting" the particular perspective from which we in each case judge of the actions of other people as well as our own actions, so that we can take our stand in the shape of "anyone", or the judicious spectator, as Hume more elegantly expresses it.

This way of formulating the central points in Hume's theory of justice allows us to shed yet another ray of light on the role of history in a Humean discipline of natural jurisprudence. If one of the central tests of justice is the maximization of compatibility of aims, in the way outlined above, then clearly knowledge of the "aims" which pervade in a society at any given time will be of decisive importance. Such knowledge would be contained in a natural history of the society, and particularly a natural history of its law. It is exactly in this sense that we can read Hume's point about the importance of *de facto* possessions at the establishment of the rules of justice. If *de facto* possessions were not respected as they happened to have developed in a given society, then many more persons' aims would be thwarted than was in fact the case with the rules of justice. This does, of course, not mean that people actually calculated in this way. What it does mean is that if anyone came in doubt about the justice of the rules, then knowledge about the existing conditions (*de facto* possessions)

would be decisive in order to settle his doubt. What I suggest is that we can read this as Hume's model for how to determine any question of justice. And it would seem that this model extends well beyond problems of justice: it explains Hume's respect for the importance of the given situation for the evaluation of any social phenomenon, whether a past, a present, or a proposed future one.⁶⁰

All those reformulations of Hume's points lead us to show how his extraordinary combination of descriptive and normative disciplines completely bypasses the usual "is/ought" problems as far as justice is concerned.⁶¹

The whole point in Hume's denying that there is a state of nature is that man's aims and aspirations always exist in a context of other men's aims and aspirations. This means that the normative question of what to do always arises, so to speak, piecemeal: what can I do, given all the other things which I and everyone else want to do?

Moral justifications can never be ultimate; they must take their starting point from a given social value-system. Such a system must always be present where men are: at the very least there must be the will to live and propagate and the confined benevolence amongst the members of a family. But when this is the case the normative question of what to do will never arise as a question of ultimate justification. It is impossible for us to say whether an action or rule of action is just in an absolute sense. All we can do is to check its justice, given all the other aims and values we hold - and each of these can again be checked in the same piecemeal fashion. In a sense this is a coherence theory of moral validity, but it should be remarked that a very firm link to nature is provided by the natural "aims" or strivings of human nature.⁶²

We can now see that the evolution behind justice and law does not as such lend it any further weight. The antiquity of law does not in itself make it obligatory. It is, therefore, misleading to see any close relations between Hume's theory and the traditionalist justification of law which we find in e.g. the Common Law theoreticians, the Whig tradition, and in Burke, as has been suggested.⁶³ In a sense Hume is closer to the modern natural law theoreticians in claiming that there are certain universal tests for justice. But he is quite unlike them in letting the given system of values in a society play an important role in these tests. Hume's theory is built around a distinction between the origin and the moral value of justice, and his treatment of the former gives a superficial affinity with the traditionalist approach, his treatment of the latter a nearly as superficial affinity with natural law.

The alternative of historical justification or natural law is not the only one which becomes obsolete in Hume's theory. The same applies to natural law versus a positivist foundation for law, as has already become clear. Natural justice is neither a set of eternally valid, substantial laws; nor is it a deliberate human construction. It is, rather, a few universal test principles, which necessarily refer to the existing value system in a society. The implication of this view would seem to be that justice is neither totally relative (to society, age, class, or whatever), nor absolute in the sense that it is spelled out in definite rules - although, given the world and human nature as they are as a matter of empirical fact nearly universally are (relative scarcity and confined benevolence), the basic rules of justice will take the form explained by Hume: "the stability of possession, .. its

transference by consent, and ... the performance of promises. (T. 526)

But natural justice as such seems to be a kind of directive ideal, somewhat in analogy with the way in which truth can be said to be a directive ideal in our search for knowledge. And the search for justice becomes a process without any natural end point - at least as long as mankind remains an "inventive species" with ever new kinds of behaviour to be tested for their justice.

Section 12. The Contract

Although all the above mentioned implications seem to follow clearly enough from Hume's theory as he stated it, they are obviously well beyond his own speculations, at least as these have come down to us in his writings. It may, therefore, be appropriate to round off this discussion of Hume's view of justice by seeing how it is used by him as politically fundamental. This can, I think, be summed up in two points: natural justice is both logically and temporally prior to civil society and civil law.

It is logically prior in the sense that it is the ultimate rationale for the existence of governments (i.e. civil society): it is to administer it that governments are instituted and maintained. (T. 537-38, E. 205) All civil law contains those essential elements of justice, adapted to the particular social and historical situation:

"all questions of property are subordinate to the authority of civil laws, which extend, restrain, modify, and alter the rules of natural justice, according to the particular convenience of each community. The laws have, or ought to have, a

constant reference to the constitution of government, the manners, the climate, the religion, the commerce, the situation of each society. ... *What is a man's property?* Anything which it is lawful for him, and for him alone, to use. *But what rule have we, by which we can distinguish these objects?*

Here we must have recourse to statutes, customs, precedents, analogies, and a hundred other circumstances; some of which are *constant and inflexible*, some variable and arbitrary. But the ultimate point, in which they all professedly terminate, is the interest and happiness of human society."

(E. 196-198; last set of italics mine.)

If we did not already know the special meaning Hume gives "the particular convenience" and "interest and happiness of human society", and if we did not pay attention to the "constant and inflexible", this would sound like pure legal positivism. But when we do know that there is a universal core of natural law which cannot be modified away by socio-historical circumstances, we will not be surprized to see that Hume clarifies his position here and states that natural law *can*, if necessary, be used to criticize positive law:

"If the ideas of justice, sometimes, do not follow the dispositions of civil law; we shall find, that these cases, instead of objections, are confirmations of the theory delivered above [i.e. that the foundation of justice is utility]. Where a civil law is so perverse as to cross all the interests of society, it loses all its authority, and men judge by the ideas of natural justice, which are conformable to those interests." (E. 197, note)

That the fundamental rules of justice are prior to civil society in time is equally obvious. First of all, they are a spontaneous growth which, as we have seen, necessarily accompanies even the most primitive human life in family groups and is a necessary condition for the extension of the latter:

"The state of society without government is one of the most natural states of men, and may* subsist with the conjunction of many families, and long after the first generation. ... But tho' it be possible for men to maintain a small uncultivated society without government, 'tis impossible they should maintain a society of any kind without justice, and the observance of those three fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises." (T. 541)

But not only are the laws of justice obligatory "antecedent to government" (ib.), and not only is the protection of them the very rationale behind government; the institution of governments is directly dependent upon justice or, more particularly, promises.

Hume's idea is simply that in order to institute government, men have to become obliged to obey it. But in a non-civil society the only thing that conveys such obligation is the natural law about promises. And accordingly men have to bind themselves to their government by a promise. (T. 541) In so far as this is the case, the Whig tradition is right that there is an original contract. (T. 542) But he then goes on to state his famous argument that this does not mean, as the Whig tradition thought, that all governments only gain their legitimacy through promises. For once government is established it carries

its own obligation, without any influence from promises and contracts. (T. 542-553) This part of Hume's argument is, however, beyond our interests here. What is of relevance here is the idea that natural law, by means of promises, is basic to the institution of all government.

To get a proper understanding of Hume's idea of the original social contract it is important to remember that he clearly conceives this contract to take place not only after, but as a result of, certain social developments. He first points out that as a fairly sophisticated social life is quite possible without government, he will

"assert the first rudiments of government to arise from quarrels, not among men of the same society, but among those of different societies." (T. 539-540)

And he then adds a rather significant reflexion:

"A less degree of riches will suffice to this latter effect, than is requisite for the former."

What is implied in this sentence is, of course, that governments, as we know them, seem to have the protection of property as one of their main tasks. But on the one hand property-accumulation on a large scale must be a late growth in society, (cf. T. 541) and on the other hand the "rudiments of government" are known in societies that had not developed so far. Accordingly another cause of the institution of government than internal conflict over property must be found, and Hume proposes "international", i.e. inter-tribal, conflict. In such conflicts there will necessarily be a war-leader, and although he loses his authority in peace-time, the experience with

"This authority ... instructs them [the members of the tribe] in the advantages of government, and teaches them to have recourse to it, when either by the pillage of war, by commerce, or by any fortuitous inventions, their riches and possessions have become so considerable as to make them forget, on every emergence, the interest they have in the preservation of peace and justice." (T. 540)

What Hume is pointing out in this argument is that men already before the actual institution of governments have the opportunity of experiencing the public interest in some kind of leadership, so that when they come to transfer this leadership from the conduct of war to the administration of justice (ib. 541), they do it on the background of this experience. And the fact that the public interest is involved and understood, of course, ensures that the promises of allegiance automatically carry both the interested and the moral obligation to make them efficient.

If we take the original contract to be the *effect* of a development - and a long one: "many years must elapse" etc. (T. 541) - then it becomes much more plausible and much more in line with Hume's general theory of the evolution of justice. And it demonstrates to us how fundamental the natural law of justice is.

C H A P T E R I I I

SMITH'S THEORY OF JUSTICE

Section 1. Hume and Smith on Sympathy

Turning from Hume's major philosophical work, the *Treatise*, to that of Smith, *The Theory of Moral Sentiments*, is in most ways a somewhat confusing experience. On the one hand there are all the similarities in the problems dealt with and the theories proposed, the criticisms and alignments of predecessors, and there are the recurring, more or less clear references to Hume himself. On the other hand there is a significant change in the tone and style of the discourse. While one could say that Hume is constructing an abstract theory with its own language, and trying to accommodate common experiences and their linguistic expressions within it; Smith is trying to accommodate an abstract theory within the conceptual framework of ordinary language - or at least with a minimal stretching of it. And this is presumably one of the reasons why Hume scholars find it difficult to find much profundity in Smith, and why Smith scholars may tend to think that Hume's profundity was bought at the cost of empirical content and relevance. Nor is the difference just linguistic and stylistic. For it is precisely Smith's complaint against Hume that his theory of morals was a philosopher's construction which did not catch human morality as it is,¹ a complaint which we will have occasion for returning to in the present chapter.

Smith's use of the word "sympathy" is a prime example of the advantages and of the dangers in using ordinary language for theoretical purposes. On the one hand we all understand it to some extent, but

precisely because of this it is difficult for us to get at the technical twist Smith gives it. Or, in sympathy with Augustine's difficulties with time, we seem to know what it is as long as we don't ask Smith. Nevertheless, there seems to be some considerable consensus among many of the most distinguished commentators on one point, namely that Smith's concept of sympathy, whatever it be, is radically different from that of Hume. It is, therefore, with some hesitation that I suggest that there are some striking structural similarities between the theories of sympathy in our two philosophers and that the equally striking differences come about because Smith broadens and generalizes Hume's idea.²

One key to the problem of sympathy in Hume and Smith seems to be to see it as a problem of causation. When we have two similar passions and one is said to be the effect of sympathy with the other, or the sympathetic reflection of the other, what does "sympathy" stand for? Hume narrows his answer to a fairly simple psychological process in the first instance: When a man perceives the expressions of a passion in another man, he forms an idea of this passion on the background of his own earlier experience and this idea is turned into an impression, i.e. into a passion similar to the original one in the other person, by the enlivening presence of the impression of the spectator's self. This psychological process is the starting point for all evaluation, but in order to create a proper moral or aesthetic evaluation, the sympathetically created passion has to be "corrected" in the light of the *situation* in which the original passion and its expression occurred. As we have seen in the previous Chapter, this is the way in which objective evaluations come about.

What Smith does is simply to broaden the causal factors in the creation of the sympathetic reaction of the spectator to *include* the situation in which the original passion and its expression occurred. According to him the situation is not just a secondary and corrective factor. It is not just the perception of the expression of another man's passion that sparks off our sympathy. It is true that this may be the case to some extent with fairly simple passions which do not point beyond the person who has them, such as joy or grief, (TMS, I,i,1,§6 & 8) but even in those cases the sympathy is rather imperfect until more is known than the mere passion (or, rather, its expression. TMS, ib., §9). Certainly more is required in the case of the morally more relevant passions which point towards, or involve, other men (ib., § 7). The cause of sympathy is, rather, the whole set of circumstances in which the passion occurs, the *situation*:

"Sympathy ... does not arise so much from the view of the passion, as from that of the situation which excites it."

(TMS, ib., §10)

This is extremely important, for it shows a distinction between the *object* of sympathy, which is another man's passion, and the *cause* of sympathy, which is the whole situation that gives rise to the original passion. And this again shows that the original passion is only a contingent part of the whole process. The causes may, for some reason, have failed to produce the original passion and yet they may produce the sympathetic passion in the spectator. Hence the possibility that the spectator can say what the original passion *should have been* according to his view of the situation. Smith illustrates this very important idea by some well-known non-moral cases: the sympathy we can feel

with the affliction of being an idiot, although the idiot may be perfectly happy;³ the sympathy a mother will feel for her sick baby's future, although the child does not have the slightest possibility of knowing anything about its future; and, the most extreme case of all, our sympathy with the dead, although every possibility of feeling any passions at all is ruled out for them. (TMS, ib., §§ 11, 12, 13)

Now, this account of the causes of sympathy is clearly different from Hume's, but it is equally clearly compatible with it. For all Smith is doing, so far, is to point out that the cause Hume singles out, the perception of expressions of passion, is insufficient in itself and far from universally present when the effect, namely sympathy, is present.

Hume's theory makes actions and their motives in a sense forward-looking, and accordingly we judge of them under this viewpoint. Motives and actions are seen as aiming at certain results, intentionally or unintentionally, and moral judgements in a way consist of estimates of their merit in this regard. By contrast, actions and their motives are backward-looking for Smith; they are reactions to a situation. And it is in this view we judge of them, as proper or improper to the situation. This change is of consequence not only for the contents of moral theory, as we will see below, but also for its epistemological status or, rather, for the epistemological status of moral judgments. On Hume's own epistemological terms moral judgment must in the end take its *beginning* from an illusion for it starts with imagining the essentially private and inaccessible reaction of one man to the action (or motive) of another. It is based upon a kind of analogical "inference"

called sympathy; and it is upon this that the situational "corrections" are superimposed, thus creating moral (or aesthetic) judgment proper.

This is significantly changed in Smith, for in taking moral judgment as *primarily* a problem of fitting the action judged of to its situation, Smith switches the problem of knowledge on to the situation.

To be able to judge is to be able to know the situation and hence the ideal of the impartial and informed spectator. This is obviously an advance in the explanation of the communal character of our moral world; for at least parts of the situation will normally be open to the public view and the whole exertion of sympathy makes as much of the situation as possible common between spectators and the person principally concerned. In other words, in Smith's view moral judgments have a much broader empirical basis already as their starting point than they have for Hume.

Smith is able to put this to good theoretical use, for the view of the situation as the primary basis for moral judgment allows him to make a rough division of situations and their attending sentiments according to their normal accessibility to spectators through sympathy. This is what he is doing in Part I, Sec. ii of *The Theory of Moral Sentiments*. Thus it is e.g. difficult for us to enter into passions arising from another's body (ib., ch. 1) and it is more difficult with those which have internal causes, than with those which have external causes which we can see (ib., 1, § 10). Equally, it is difficult for a spectator to get sympathetic understanding of passions which are somehow unique for the person concerned (ib., ch. 2), such as love (2, § 1). But though we are unable to go along with the

particular passion, we know its general type and this enables us to enter into all the surrounding or attending passions. Love

"interests us not as a passion, but as a situation that gives occasion to other passions which interest us".

(ib. 2, § 2)

Smith then goes on to discuss three much more important categories of passions; the unsocial, the social, and the selfish. These we can all enter into, i.e. understand, by sympathy, and his main theme is to what extent we can sympathize with them in the sense of approve of them as proper. (This is in a way the main theme of the whole section but it forces him to treat of the theme we are interested in here, the accessibility of the various kinds of passion.)

Hume's explanation is in terms of the chain of association. Smith uses the broader "imagination". But obviously it would have been quite possible for Smith to explain the function of imagination by means of association. Presumably he did not do so because it for his purposes would have been an unnecessary detail in the general theory.

Be that as it may, there are some striking parallels in the further details of the two theories. For Hume, the sympathetic feeling arises when we expose ourselves to the influence of the expression of the original feeling and although it resembles the original, the sympathetic feeling is our *own* as spectators since it comes about through the enlivening influence of the impression of the self. Whether or not this can be described in modern psychological terms as empathy⁴ is rather irrelevant. The main point is to notice that it is a simple condition for sympathy that the sympathetic feeling exists as the spectator's.

According to Smith, the sympathetic feeling arises when the spectator exposes himself to the influence of the circumstances which gave rise to the original feeling. This can only be done by means of the famous imaginary change of situation: we imagine that we are in another man's situation in order to see what our reactions would be under such influence. And the feelings that we, as spectators, come to have by this use of imagination are the sympathetic feelings, "sympathy, or the correspondent affection of the Spectator". (TMS, VII, ii, 3, § 21) The point which has always caused difficulties is, of course, how we are to understand this imaginary change of place for the spectator. What is it he changes: just the situation, or himself as well? It seems to me that there is not and cannot be any clear general answer to this. It necessarily varies with a number of factors, such as the personalities of both spectator and agent (the man who has the original feeling), their mutual relationship, the nature of the situation and the feeling concerned etc.

But there are a couple of points to be made about it. Firstly, the personality of the agent is in itself a very important part of the total situation and, therefore, the better the spectator is able to identify in imagination with this personality, the better will be his understanding of the situation and the more accurate, therefore, his sympathetic feeling.⁵ But secondly, it must be pointed out that for Smith, just as for Hume, the act of sympathizing must necessarily be accompanied in the spectator by a consciousness of his own self. The whole drive behind all sympathizing is, as we will see, a basic wish to relate or compare our *own* reactions to those of *others*. It is only this "tension" between persons that gives rise to all evaluations

of persons, of which the act of sympathy is the necessary first step.

It is, therefore, necessary and, in my view, rather a matter of course that Smith right from the beginning of his discussion of sympathy makes it plain that the spectator's own consciousness always in some degree accompanies the act of sympathy and that however successful he may be in approaching the actual state of the agent, what he feels

"will, indeed, always be in some respects different from what [the latter] feels, ... because the secret consciousness that the change of situations, is but imaginary, not only lowers it in degree, but in some measure varies it in kind, and gives it a quite different modification." (TMS, I,i, 4, § 7)⁶

Indeed, one can say that it is only on condition that Smith retains the spectator's self-consciousness in all acts of sympathy that he will be able to use the sympathy mechanism as the foundation for evaluations at all for, as we have already seen, we are perfectly able to sympathize, and thus evaluate, even where there is either no, or a completely subnormal and un-reachable person to sympathize with, i.e. where there is absolutely no other person with whom to "identify". In short, the degree to which the spectator can take up the place of the agent in his imagination is a matter of many degrees, but there is a point beyond which he cannot possibly go in his identification: he must retain some consciousness of his own self as that which sympathizes.

Section 2. Sympathy and Moral Approval

Smith opens *The Theory of Moral Sentiments* by pointing out the reality of sympathy as a principle in human beings, even in the worst of them. But it is important to remember that he does not let the matter rest there. He does in various places make it clear that sympathy is put to work by an even more fundamental principle in human nature, the desire to agree, to be in accord with our fellow-men. Thus he says e.g.:

"The great pleasure of conversation and society ... arises from a certain correspondence of sentiments and opinions, from a certain harmony of minds, which, like so many musical instruments, coincide and keep time with one another. But this most delightful harmony cannot be obtained unless there is a free communication of sentiments and opinions. We all desire, upon this account, to feel how each other is affected, to penetrate into each other's bosoms, and to observe the sentiments and affections which really subsist there." (TMS, VII, iv, § 28)

This nearly compulsory interest in other men is extremely important. On the one hand it leads men to let themselves be led by others; on the other hand it makes them try to lead others. And it is basically this continuous exchange that underlies all human culture. It probably underlies language; through vanity it is the foundation for all distinctions of ranks in society; in the form of bartering it is behind any economy; and through the mechanism of sympathy it gives rise to human morality.

The seeking of agreement does, however, only require sympathy when the

object about which agreement is sought is somehow closely connected with one person but not the other(s), so that the former will be influenced in a significantly different way, i.e. be in a different situation. This is not the case with e.g. the objects of "science and taste". Here all

"look at them from the same point of view, and we have no occasion for sympathy, or for that imaginary change of situations from which it arises, in order to produce, with regard to these, the most perfect harmony of sentiments and affections." (TMS, I,i,4, § 2)⁷

But if the object is such that one man is particularly affected by it, say, another man's being resentful against him, everybody else, i.e. all spectators, can only understand and evaluate his response by means of sympathy, by trying to let the object and the whole situation affect them in imagination. (ib., §§ 5,6) It is this difference in situation which, together with the desire for understanding and agreement, leads to sympathy.

However, the spectators' feelings are nothing but sympathetic reflections of the original feelings and agreement will therefore be difficult.

"The person principally concerned is sensible of this, and at the same time passionately desires a more complete sympathy." (TMS, I,i,4, § 7)

This leads *him* to sympathy with the situation of the spectator. It is thus only by a mutual sympathy in this sense that the maximum degree of agreement can be reached. This will never be complete because of the spectator's own accompanying consciousness but it can be quite "sufficient for the harmony of society". (Ib.)

Sympathy in the sense now explained is the means for all judgment of other men and, as we will see later, also of ourselves. The basic act of evaluating or judging simply consists in a comparison between the original reactions of the person principally concerned and the sympathetic reactions of the spectators. If they are in agreement, the spectators approve of the man concerned, otherwise they disapprove:

"To approve of the passions of another ... as suitable to their objects, is the same thing as to observe that we entirely sympathize with them; and not to approve of them as such, is the same thing as to observe that we do not entirely sympathize with them." (TMS, I,i,3, § 1)

Here is clearly implied that distinction between sympathy and approbation resulting from sympathy which Smith had to clarify for Hume in a later footnote:⁸

"It has been objected to me, that as I found the sentiment of approbation, which is always agreeable, upon sympathy, it is inconsistent with my system to admit any disagreeable sympathy. I answer, that in the sentiment of approbation there are two things to be taken notice of; first, the sympathetic passion of the spectator; and, secondly, the emotion which arises from his observing the perfect coincidence between this sympathetic passion in himself, and the original passion in the person principally concerned. This last emotion, in which the sentiment of approbation properly consists, is always agreeable and delightful. The other may either be agreeable or disagreeable, according to the nature of the original passion, whose features it must always

in some measure, retain." (TMS, I,iii, 1, § 9, note)⁹

This is the abstract clarity reminiscent of Hume which any scholar would like to have seen more of in Smith. There is, however, sufficient of it to enable us to see the following distinctions in Smith's theory of sympathetic evaluations. Firstly there is the imaginary change of situation by which the spectator tries, as far as possible, to expose himself to the same causal influences as the man originally concerned. We will often find this process alone called sympathy in Smith. Secondly, there is the result of the influence of this cause, namely the reaction of the spectator. This too is called sympathy, or the sympathetic feelings, sentiments etc. Thirdly, there is the comparison of the original and the sympathetic sentiments. And fourthly, there is the emotion arising from this comparison, which is either a kind of pleasure called approval when the original and the sympathetic sentiments coincide, or a kind of pain called disapproval when they do not coincide. This pleasure is also often called sympathy, while the pain ought to be, and occasionally is, called antipathy. It is clear that when Smith uses sympathy in the first two senses it is neutral and may result in antipathy as well as in sympathy in the last mentioned sense. This usage is technical and presupposes an understanding of his theory while the last sense seems to be closer to the ordinary sense of the word where it implies some kind of positive attitude. What is most confusing of all, however, is that Smith frequently uses sympathy to denote all three of the senses mentioned plus the comparison, i.e. he often talks of sympathy as the whole process including its result, which in that case can only be "positive" (approval).

I mentioned that approval and disapproval for Smith are special kinds of pleasure and pain, namely those arising from the comparison of original with sympathetic sentiments. This needs some justification. Smith never treats this very explicitly but, first of all, he does in the footnote already quoted call the positive case, approval, "agreeable and delightful". Furthermore, he has a whole chapter, called 'Of the Pleasure of mutual Sympathy', (TMS, I,i,2) in which he points out that sympathy has its own distinctive pleasure, both for the man who receives the sympathy (ib., §§ 1-5), and for the man who gives it (§ 6) and it is quite clear that sympathy here must mean, or include, approval. In the same chapter he also deals with the negative case, i.e. what we would like him to call antipathy or disapproval, in a parallel way. The conclusion must be that in this basic question of the character of approval, Smith was in virtually complete agreement with Hume: they would both maintain that approval and disapproval consist of distinct emotions or passions.¹⁰ Their whole argument is over the chain of causes leading to those passions.

Section 3. The Mutuality of Sympathy

I have already more than once indicated that sympathy for Smith is something *mutual* between men. This feature of sympathy is, I suggest, completely crucial for Smith's whole moral theory and, indeed, his idea of sympathy is in itself hardly intelligible without it. Yet it is easy to undervalue the importance of the mutual character of sympathy because of the way in which the *Theory of Moral Sentiments* is composed. For although he already in the second chapter of the book

treats "Of the Pleasure of mutual Sympathy"; although he as early as I,i,4, § 7 gives a fairly good description of the idea; and although one cannot get an adequate understanding of Parts I and II without presupposing it, it is not till Part Third that the reader is presented with a really thoroughgoing treatment.

One can say that in Parts I and II Smith tells us how sympathy is *given*, whereas he in Part III shows how it is taken or *received*. But as one of Smith's maybe most original points is that the moral sentiments which he wants to explain are the outcome of *both*, the first two Parts lose much of their significance if they are not read in the light of Part III.

Smith always takes it as a matter of course that man is social, that he is bound to be together with his fellows. This means that he will always literally have to look upon them; he is forced to watch them and see what they are like, physically and morally, i.e. as to behaviour:

"Our first ideas of personal beauty and deformity, are drawn from the shape and appearance of others, not from our own ... In the same manner our first moral criticisms are exercised upon the characters and conduct of other people". (TMS, III,1, §§ 4,5)

Irrespective of the fact that men are naturally searching for agreement with their fellows, as mentioned earlier, they are forced by their social circumstances, by their mere togetherness, to *give* sympathy in the neutral sense of trying to understand each other. But the important thing is, that men will immediately discover by this

means, that their fellows are watching *them* in the same way:

"We soon learn, that other people are equally frank
with regard to our own [characters and conduct (and look)].

(ib., § 5)

Once we realise *this*, we for the first time become aware of ourselves as persons with a certain physical and, more important, moral look which can be the subject of evaluation. The awareness of other people's observation and evaluation of us makes us see that there is something to be observed and evaluated and we naturally try to imagine what it can be, i.e. how we suppose we look to other people:

"We begin ... to examine our own passions and conduct, and to consider how these must appear to [others], by considering how they would appear to us if in their situation." (TMS, III, 1, § 5)

It is thus the perception or, in my earlier terminology, the reception of other men's sympathetic endeavours that makes us conscious of our own mind. And if man, *per impossibile*, grew up outside society, such consciousness simply would not develop:

"Were it possible that a human creature could grow up to manhood in some solitary place, without any communication with his own species, he could no more think of his own character, of the propriety or demerit of his own sentiments and conduct, of the beauty or deformity of his own mind, than of the beauty or deformity of his own face. All these are objects which he cannot easily see, which naturally he does not look at, and with regard to which he is provided with

no mirror which can present them to his view. Bring him into society, and he is immediately provided with the mirror which he wanted before. It is placed in the countenance and behaviour of those he lives with, which always mark when they enter into, and when they disapprove of his sentiments". (TMS, ib., § 3)

This idea that the mutuality of sympathy with sentiments creates awareness of the sentiments is closely parallel to Smith's treatment of the tactile sense in his essay "On the External Senses". He there singles out the tactile sense as unique because it alone is able to create an awareness of itself. If one part of our body touches another the other, so to speak, answers back and we in this way become conscious of our body as one large tactile sense in contrast to the rest of the world:

"When [a man] lays his hand upon his foot, as his hand feels the pressure or resistance of his foot, so his foot feels that of his hand. They are both external to one another, but they are, neither of them, altogether so external to him. He feels in both, and he naturally considers them as parts of himself ... When he lays his hand upon the table, though his hand feels the pressure of the table, the table does not feel, at least he does not know that it feels, the pressure of his hand. He feels it therefore as something external, not only to his hand, but to himself ...". (*Essays*, p. 439)¹¹

Once this awareness of ourselves as subjects of judgment has been awaked in us the desire of agreement drives us to try and judge ourselves as we imagine others would. This means that we have to act

as spectators of ourselves at the same time as we are the agents who are judged of:

"When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represents a different character from that other I, the person whose conduct is examined into and judged of. The first is the spectator, whose sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion. The first is the judge; the second the person judged of." (TMS, III, 1, § 6)

By means of sympathy we try to create a spectator position towards ourselves, we try to take up that view-at-a-distance which we perceive others take of us. This is a first sympathetic move. Next we try to imagine whether and to what extent such a spectator would be able to enter into our real position. This is a second sympathetic move. We then try to estimate the outcome of this second sympathetic move to see whether there will be agreement between our original motives and sentiments and those sympathetically created ones of the imagined spectator, i.e. whether the imagined spectator approves or disapproves of our original sentiments and motives. Finally, we try to make this spectator approval or disapproval our own by a third sympathetic move

consisting of a sympathy with the spectator. In this way we come to judge of our own behaviour by the same standard with which we judge of the behaviour of others, viz. whether it is proper or improper in the eyes of a spectator of our situation. All those moves are, I think, summarized in one single paragraph right at the beginning of Smith's treatment of the mutuality of sympathy, although his prose may not disclose it at first reading:

"We either approve or disapprove of our own conduct, according as we feel that, when we place ourselves in the situation of another man, and view it, as it were, with his eyes and from his station [First sympathetic move], we either can or cannot entirely enter into and sympathize with the sentiments and motives which influenced it [second sympathetic move and comparison]. We can never survey our own sentiments and motives, we can never form any judgment concerning them, unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us [first move]. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them. ... We endeavour to examine our own conduct as we imagine any other fair and impartial spectator would examine it [second move]. If, upon placing ourselves in his situation, we thoroughly enter into all the passions and motives which influenced it, we approve of it, by sympathy with the approbation of this supposed equitable judge. If otherwise, we enter into his disapprobation, and condemn it [third sympathetic move]." (TMS III, 1, §2)

Section 4. Common Standards, Ideal Standards and Social Adaptation

It is of the very greatest importance to understand exactly what role others, as spectators, play for the development and character of men's standards for moral self-evaluation. So far we have seen how they are a necessary condition for men's catching sight of themselves and their behaviour as objects of moral evaluation, and we have seen that this brings men to judge themselves by the same standard as they use for others, the standard of propriety. The question is, however, *what* propriety? Smith uses the whole first Part of *The Theory of Moral Sentiments* to explain propriety of action and the very first Section is 'Of the Sense of Propriety'. It is, therefore, natural to turn to that for an explanation:

"In the suitableness or unsuitableness, in the proportion or disproportion, which the affection seems to bear to the cause or object which excites it, consists the propriety or impropriety, the decency or ungracefulness, of the consequent action." (TMS, I,i,3, S 6)¹²

This may sound as an attempt at an absolute criterion of moral rightness. But one should, of course, not overlook the little "seems": propriety is a principle to be used by men when they as spectators judge of each others' behaviour. And propriety-in-use clearly means the coincidence or agreement between the original sentiment of the agent and the sympathetic one of the spectator with approval consequent upon the latter. And it is difficult to see how propriety could be anything but such propriety-in-use by particular spectators for as Smith explains:

"Every faculty in one man is the measure by which he judges

of the like faculty in another. I judge of your sight by my sight, of your ear by my ear, of your reason by my reason, of your resentment by my resentment, of your love by my love. I neither have, nor can have, any other way of judging about them." (TMS, I,i,3, § 10)

This sounds like a rather impossible subjectivism. But, of course, Smith's real feat is to show how men do have a common moral world with common standards. *How* do they get it? That is our problem, and the problem to which I alluded above by asking about the precise significance of the spectators. Now, if we stay in the first Part and the first Section, we will see that Smith already there goes some way towards what looks like an answer. He first points out how transitory and weak sympathetic feelings often are in comparison with their objects, the original feelings. He then goes on to say that this is normally anticipated and forestalled by the agent:

"The person principally concerned is sensible of this, and at the same time passionately desires a more complete sympathy. He longs for that relief which nothing can afford him but the entire concord of the affections of the spectators with his own. ... But he can only hope to obtain this by lowering his passion to that pitch, in which the spectators are capable of going along with him. He must flatten, if I may be allowed to say so, the sharpness of its natural tone, in order to reduce it to harmony and concord with the emotions of those who are about him. What they feel will, indeed, always be in some respects different from what he feels ...; because the secret consciousness

that the change of situations, from which the sympathetic sentiment arises, is but imaginary, not only lowers it in degree, but in some measure varies it in kind, and gives it a quite different modification. These two sentiments, however, may, it is evident, have such a correspondence with one another, as is sufficient for the harmony of society. Though they will never be unisons, they may be concords, and this is all that is wanted or required."

(TMS, I,i,4 § 7)

This early passage is a prime example of how an adequate understanding presupposes knowledge of doctrines only stated later in the work. For quite clearly he is here using the idea of the mutuality of sympathy, of how sympathy is "received", which I have presented already as it is developed in Part III. The "lowering" of the passion on the part of the person sympathized with can only be understood in this way.

The reason for quoting the passage is that it ends by formulating a very important point rather clearly, namely that the operation of mutual sympathy unintentionally creates common social standards: standards which are at least sufficiently common to make social life possible. This again gives occasion for remarking various other points of very central importance in Smith. First of all, it shows that mutual sympathy is a mechanism for the selection of behaviour that is adequate to the situation, primarily the social situation, and that this is the efficient cause lurking behind much of the teleological talk in Smith. This is possibly Smith's greatest contribution to social theory and it must be left for more extensive treatment at a later stage.

Secondly, we are led to ask whether, according to Smith, the socially accepted and necessary is all there is to morality, or whether parts of morality can gain some independence of the commonly received, i.e. whether moral ideals are possible. A theory to explain this must be able to account for how moral ideals develop out of social morality, since the latter is the empirically given morality. It must therefore be a theory of how moral ideals can detach themselves from social morality, how ideal morality can emerge from and become independent of *de facto* morality.

It is exactly such a theory Smith is proposing. The standard by means of which men judge of themselves is the same as that by which they judge of others: propriety. And, as we remember, propriety is a question of the aptness of a given action and its motive to its situation. This means that although it is our appreciation of others' judgment of our behaviour, through the mutual sympathy mechanism, that starts us judging ourselves, this *leads* us to do so in terms of a standard *different from the opinion of others*. We are started off by asking whether others would think our behaviour proper but this leads us to ask whether it is in fact proper. And this latter question can only be answered if we take up the position of a spectator of ourselves; not any concrete spectator, for he will have his own particular interests and biases, just as we have ours. It must be the position of "a third person", an impartial spectator who is an ideal whom both agents and actual spectators can approach. Instead of the propriety of social morality, of the actual spectators, we are thus led to try and judge ourselves in terms of an "absolute" propriety for each given situation.

In this way it is *possible* for men to detach their morality, at least to some extent, from the social circumstances which created it. And parallel with this independence goes a desire to reach absolute propriety, for once men feel that there is a distinction between that and what is thought to be proper by society, they also realize that if there is any difference between them, this must be due to misinformation on the part of the latter and that only the former is genuine. There is here a healthy Socratic element in Smith, as in Hume, to the effect that once the basic pattern of evaluation is given the rest is to a large extent a matter of knowledge of the situation.

Just as a displacement can take place in the moral principle applied so it will be accompanied by a displacement in moral ideals. We are started off in moral life trying to apply other men's ideas of propriety and aiming at their approval and consequent praise; but we soon end up trying to apply propriety as such, i.e. the impartial spectator's idea of propriety, and aiming at the approval and praise of the impartial spectator, aiming at absolute approval and praiseworthiness. (III, 2)

This displacement is in no way mysterious for in prying into our own behaviour and motives we must inevitably gain knowledge which is inaccessible to other men, and this makes it possible for us to judge of and criticize other men's judgment of us. If we thus come to the conclusion that we are either approved and praised or disapproved and blamed without deserving, being "worthy" of ^{it}/this diminishes, or takes away, the pleasure/pain we receive from the judgment of others. We do not consider their judgment morally correct any longer. (III, 2, §4 and §11, respectively for praise and blame.) In the same way, if we are not in fact praised or blamed but come to the conclusion that we

deserve it, we put our own approval/disapproval in its place.

(ib. §5 and §§9-10 respectively)¹³

When men in this way develop and internalize a morality which aspires to a certain independence, we can talk of the operation of their conscience, or of the impartial spectator in them:

"reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct". (TMS, III, 3, §4)

When men regulate their behaviour by this means we talk of their self-command, which is in a way a kind of meta-virtue since the other main virtues (prudence, justice, and benevolence) only gain their moral value when men are in command of themselves to perform them:

"Self-command is not only itself a great virtue, but from it all the other virtues seem to derive their principal lustre." (TMS, VI, iii, §11)

We have now seen how Smith's theory is able to explain the possibility of a morality which is independent, or at least partly independent, of social morality although it develops out of the latter by a displacement of actual spectators with the ideal of the impartial spectator. This distinction between "high" morality and mere social opinion must, however, be handled with care, for although the former develops out of the latter, it will in its turn have a decisive influence on the latter. The subtleties of this relation are rather important to keep clear.

First of all, we must notice that Smith insists that the seeking of social approval is not enough for the existence of society; a search

for moral approval proper is necessary:

"Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favourable, and pain in their unfavourable regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive. - But this desire of the approbation, and this aversion to the disapprobation of his brethren, would not alone have rendered him fit for the society for which he was made. Nature, accordingly, has endowed him, not only with a desire of being approved of, but with a desire of being what ought to be approved of; or of being what he himself approves of in other men. The first desire could only have made him wish to appear to be fit for society. The second was necessary in order to render him anxious to be really fit." (TMS, III, 2, §§ 6-7)

This may sound as little more than a traditional piece of homiletic natural theology, but in Smith it is always wise to think twice on such occasions. We will leave the problem of teleological explanations till later and concentrate on the major question here: why is the search for social approval not enough for social life? Why is it necessary that men seek higher moral approval? First of all we must remember that for Smith it is a simple matter of fact that men do seek such approval once society has started them in their moral life in the way we have already seen. But furthermore, we must remember that the seeking of social approval, of the approval of the actual spectators,

is bound to lead to disagreement because we are differently related to our own behaviour in comparison with our spectators; we are naturally partial and we are often, in a sense, better informed. It is precisely this disagreement that starts us looking for a third and better standpoint from which to judge and this search for a third standpoint is undertaken by agent and spectator alike. This is the point of Smith's simile with the landscape seen through the little window and the landscape as well as the window seen from a third position equidistant from both. (TMS, III, 3, §2) It is in this sense we must understand that,

"Before we can make any proper comparison of those opposite interests [our own and the spectator's], we must change our position. We must view them, neither from our own place nor yet from his, neither with our own eyes nor yet with his, but from the place and with the eyes of a third person, who has no particular connection with either, and who judges with impartiality between us." (TMS, III, 3, §3)

In other words, the very seeking of social approval, of the approval of the actual spectators, has a strong tendency to become a search for another and higher judgment and approval which is *common between agent and spectator*. This search for a third standpoint of absolute impartiality may never, or very rarely, be completely successful, but the really important point, and the point which Smith tried to make in the previous quotation (TMS III, 2, §§ 6-7), is that it is the *search* itself which makes social life possible; it is the *search* for a common standpoint that is common, not necessarily the standpoint.¹⁴ It is therefore this process of continuing search that really constitutes social morality.

But what does it mean that the morality which keeps society together is such a process? It means that it is a continual weeding out of behaviour which is incompatible with social life. The operation of mutual sympathy in the search for a common, "higher" standpoint is a mechanism for the adjustment of behaviour to the circumstances of society. Smith shows this by means of some striking examples. First on the small scale of the individual's adjustment to his given social circumstances, the most charming being the case of the child:

"A very young child has no self-command; but, whatever are its emotions, whether fear, or grief, or anger, it endeavours always, by the violence of its outcries, to alarm, as much as it can, the attention of its nurse, or of its parents. While it remains under the custody of such partial protectors, its anger is the first, and, perhaps, the only passion which it is taught to moderate. By noise and threatening they are, for their own ease, often obliged to frighten it into good temper; and the passions which incites it to attack, is restrained by that which teaches it to attend to its own safety. When it is old enough to go to school, or to mix with its equals, it soon finds that they have no such indulgent partiality. It naturally wishes to gain their favour, and to avoid their hatred or contempt. Regard even to its own safety teaches it to do so; and it soon finds that it can do so in no other way than by moderating, not only its anger, but all its other passions, to the degree which its play-fellows and companions are likely to be pleased with. It thus enters into the great

school of self-command; it studies to be more and more master of itself; and begins to exercise over its own feelings a discipline which the practice of the longest life is very seldom sufficient to bring to complete perfection." (TMS, III, 3, § 22)¹⁵

The real spectator introduces the impartial spectator¹⁶ and the result is a life-long adjustment of behaviour. This idea of mutual sympathy as a selection procedure does, however, get a perhaps still better illustration when applied to the broader case of how a society adjusts to its situation. Smith goes into some detail about this in Part Fifth, 'Of the Influence of Custom and Fashion', chapter 2. At first reading what he has to say here may sound as a rather vague functionalism:

"The different situations of different ages and countries are apt ... to give different characters to the generality of those who live in them, and their sentiments concerning the particular degree of each quality that is either blameable or praiseworthy, vary according to that degree which is usual in their own country and in their own times. ... Every age and country look upon that degree of each quality which is commonly to be met with in those who are esteemed, among themselves, as the golden mean of that particular talent or virtue; and as this varies according as their different circumstances render different qualities more or less habitual to them, their sentiments, concerning the exact propriety of character and behaviour, vary accordingly." (TMS, V, 2, § 7)

But the following §§ show that Smith has a real explanation to offer for

this. His procedure is to compare "civilized" society with "savage" or "barbarian" society:

"Every savage undergoes a sort of Spartan discipline, and, by the necessity of his situation, is inured to every sort of hardship. ... His circumstances not only habituate him to every sort of distress, but teach him to give way to none of the passions which that distress is apt to excite. *He can expect from his countrymen no sympathy or indulgence for such weakness.* ... A savage, ... whatever be the nature of his distress, expects no sympathy from those about him, and disdains upon that account to expose himself, by allowing the least weakness to escape him." (TMS, ib., §9; my italics)

And Smith goes on to describe in picturesque details the hardness of savage lifestyle before switching to the contrasting society:

"This heroic and unconquerable firmness, which the custom and education of his country demand of every savage, is not required of those who are brought up to live in civilized societies. ... A humane and polished people, who have more sensibility to the passions of others, can more readily enter into an animated and passionate behaviour, and can more easily pardon some little excess. *The person principally concerned is sensible of this;* and being assured of the equity of his judges, indulges himself in stronger expressions of passion" (ib., § 10; my italics)

More reasoning of the same kind at length allows Smith to draw his conclusion:

"In general the style of manners which takes place in any nation

may commonly, upon the whole, be said to be that which is most suitable to its situation. Hardiness is the character most suitable to the circumstances of a savage; sensibility to those of one who lives in a very civilized society."

(TMS, ib. §13)

We can now see that there is nothing mysterious in this conclusion. Smith is very well able to specify the efficient cause for why behaviour in general is fitting to its situation: it is simply that all behaviour that is not so fitted will tend to be weeded out by means of antipathy conveyed through the mutual sympathy mechanism, whereas behaviour that is fitting will tend to be reinforced by approval conveyed in the same way.¹⁷ This is of outstanding importance for it shows that however much teleological talk Smith allows himself he can do so perfectly legitimately. He has an efficient cause which can explain the seeming purposefulness of human behaviour, a problem to which we will return.

We have so far allowed a certain amount of equivocation in our treatment of Smith's idea of the selection of behaviour through mutual sympathy. The point he is mainly trying to make in the chapter from which we last quoted is that although the selection always takes place by means of mutual sympathy, this may not lead to the implication of the impartial spectator in certain limited areas of behaviour because of the influence of customs, habits, and fashions. In such limited areas the search for his standpoint, i.e. for "natural" or absolute propriety, is not invariably required for the very existence of society and accordingly a certain straying away from this search can take place under the guidance of customs and fashions without being weeded

out. But this influence of custom and fashion can only concern "the propriety or impropriety of *particular* usages" and not "the *general* style of character and behaviour" (V, 2, §12):

"The different manners which custom teaches us to approve of in the different professions and states of life, do not concern things of the greatest importance. We expect truth and justice from an old man as well as from a young, from a clergy man as well as from an officer; and it is in matters of small moment only that we look for the distinguishing marks of their respective characters. ... It is not, therefore, in the general style of conduct or behaviour that custom authorizes the widest departure from what is *the natural propriety* of action." (ib., §§ 13-14, my italics)

Smith then goes on (§ 15) to give a particularly horrifying example of a "particular usage", the exposition of children in ancient Greece. This practice had its origins in savage times when it was necessary and could be approved of as proper; but it was continued into civilized times through the influence of "uninterrupted custom", reinforced by "farfetched considerations of public utility", although it must obviously be considered highly improper in that situation if judged from an impartial viewpoint. When a thing like this could happen under the influence of custom, one might think that everything in human morality could be swayed by custom and fashion. But this cannot be the case, according to Smith:

"There is an obvious reason why custom should never pervert our sentiments with regard to the general style and character of conduct and behaviour, in the same degree as with regard to

the propriety or unlawfulness of particular usages.

There never can be any such custom. No society could subsist a moment, in which the usual strain of men's conduct and behaviour was of a piece with the horrible practice I have just now mentioned" (i.e. the exposition of children.

TMS, V, 2, §16)

In other words, if men did not in *general* search for "the natural propriety of action", instead of just resting content with what is socially customary or fashionable, then society would be in imminent danger of breaking down, thus extinguishing such behaviour.

This discussion in Smith is, of course, designed to show how deviations from the search for the standpoint of the impartial spectator can occur in human life when we know that this search is a natural development for man as a social being. Apart from the influence of custom and fashion,¹⁸ Smith discusses the influence of considerations of utility (Part IV), a discussion we will return to later, and on and off he naturally deals with the influence of men's partiality and egoism. This latter is particularly important as it introduces the general rules of morality. (III, 4, §7)

Section 5. General Rules and Moral Value

Smith's contrast between "particular usages" and "the general style of conduct" in the discussion of the selection of behaviour above must not be confused with a discussion of general rules. Obviously, the kind of "particular usages" he has in mind may very well be formulated in general rules. Nevertheless, there is an intimate connection between

the selection of behaviour and the general rules: the result of the selection of behaviour is simply general rules. Certain actions are repeatedly selected through sympathy as proper, others as improper, in the way we have had described above. By and by this recurrent pattern will stand out clearly and men can so to speak read it off as rules or guidelines for their behaviour:

"Our continual observations upon the conduct of others insensibly lead us to form to ourselves certain general rules concerning what is fit and proper either to be done or to be avoided. Some of their actions shock all our natural sentiments. We hear everybody about us express the like detestation against them. This still further confirms ... our natural sense of their deformity. It satisfies us that we view them in the proper light, when we see other people view them in the same light. ... It is thus that the general rules of morality are formed. They are ultimately founded upon experience of what, in particular instances, our moral faculties, our natural sense of merit and propriety, approve or disapprove of. We do not originally approve or condemn particular actions, because, upon examination, they appear to be agreeable or inconsistent with a certain general rule. The general rule, on the contrary, is formed by finding from experience that all actions of a certain kind, or circumstanced in a certain manner, are approved of." (III, 4, §8)

The general rules of morality are thus the unintended outcome of a multitude of individual instances of natural moral evaluation, but once

they are in existence they are quite capable of directing our moral evaluations. Then,

"we frequently appeal to them as to the standards of judgment, in debating concerning the degree of praise or blame that is due to certain actions of a complicated and dubious nature. They are upon these occasions commonly cited as the ultimate foundations of what is just and unjust in human conduct".

(ib. § 11)

Like Hume, Smith is one of the few philosophers who have really understood the decisive importance of general rules for the very possibility of social life. If people did not follow such rules in the most central parts of their behaviour, it would simply be impossible to orientate oneself among them. The man who was friend one moment could be foe the next:

"Without ... sacred regard to general rules, there is no man whose conduct can be much depended upon. ... such are the inequalities of humour to which all men are subject, that without this principle, the man who, in all his cool hours, had the most delicate sensibility to the propriety of conduct, might often be led to act absurdly upon the most frivolous occasions, and when it was scarce possible to assign any serious motive for his behaving in this manner. ... But if without regard to these general rules, even the duties of politeness, which are so easily observed, and which one can scarce have any serious motive to violate, would yet be so frequently violated, what would become of the duties of justice, of truth, of chastity, of fidelity, which it is often so difficult to observe, and which

there may be so many strong motives to violate? But upon the tolerable observance of these duties depends the very existence of human society, which would crumble into nothing if mankind were not generally impressed with a reverence for those important rules of conduct." (ib. III, 5, §2)

General rules are attempts at summing up mankind's approaches to the judgments of the impartial spectator, and they are obligatory upon men because of their sympathy with the impartial spectator. This means that if we break the rules without an over-riding moral reason, i.e. a "higher" rule, we will incur antipathy (cf. ib. § 7); and this is, of course, very much like Hume's idea of self-hatred.

All Smith's ideas of how a social morality is formed and of how an ideal morality develops out of it are held in purely descriptive terms. It is a *science* of morals. And yet I venture to suggest that it is of clear normative import as well. As are all good scientific laws, Smith's is universal. It covers himself as well as all other human beings and thus shows us how *he* understands moral ideals, how *he* evaluates. Just as with Hume, we must remember that in Smith's view men can never start morally from scratch: they are always living in a society and thus in a context of aims, values, and ideals. Moral evaluation is therefore only relevant in such a context. It is never a matter of goodness or badness, justice or injustice, or whatever, *per se*; but of goodness or badness, etc. on the background of, or given, a number of other values. Each of these other values, aims etc. may themselves be questioned but never the whole system, for that would be equivalent to a state of nature. It would, in other words, be impossible.

It is in this light that I suggest we see Smith's idea of the impartial spectator. When we strive towards his standpoint we are in reality seeking the position which is most widely compatible with existing values, which fits the moral context.¹⁹ This is obviously not an absolute and final test. On the other hand it does not make moral judgments completely relative to the given system of morality for, as we have seen, the standpoint of the impartial spectator implies a universal rule and it is by seeking this that we can gain independence from the given social morality. So it would seem that when we judge of the moral value of an action we consider whether it is in accordance with a general rule and whether the type of action prescribed by this rule is generally compatible with existing values. Smith's strong stress on the primacy of the situational factors in the very constitution of moral evaluations makes his explanation of the formation of the common moral ideals, the standpoints of the impartial spectator, more straightforward than Hume's. And also Smith's theory of the mutuality of sympathy is considerably more detailed than anything in Hume. Despite these differences the basic approach is, however, the same. The decisive element in our understanding as well as in our exercise of moral evaluation is the social context or situation in which it takes place.

This view of moral knowledge seems to fit in very well with Smith's general conception of knowledge. Although it is well beyond the purposes of the present work and although it would be more than hazardous to attribute a proper theory of knowledge to Smith, it is of some interest here to attempt a characterization of his general view of human knowledge, so far as one can with the sources available. The one thing which runs

through all Smith's reasoning concerning men's perception of the world is the idea of coherence. Whatever particular thing in the world men watch it must fit with its surroundings, its situation, if it is to be understood. And if it does not it creates a reaction called surprise or wonder which normally covers a craving for the re-establishment of order. This is a well-known theme from Smith's methodological reflections in the essay on the history of astronomy; but it is obviously the same fundamental idea that is at the bottom of his theory of moral judgment as well. When men judge each other's and their own behaviour in terms of propriety this is in fact judgment in terms of fittingness to the situation. If the behaviour is in this sense fitting it meets with the quiet reaction called approval, but if it is somehow unusual in the situation, i.e. if it goes either below or above the point of propriety, it causes wonder and surprise. If the behaviour is below this surprise takes the form of blame, if it is above it takes the form of praise.²⁰ In morality the adjustment consequent upon this is, in a way, twofold. On the one hand it consists in the obvious change in the judging person's, i.e. the spectator's, expectations about the person judged, and perhaps about the kind of situation concerned, but on the other hand, the mechanism of mutual sympathy makes it likely that also the person mainly concerned, the agent, changes his outlook by internalizing the reaction of the spectator in the way we now know. Sympathy is a means by which men can attempt to view themselves in their situation and thus judge themselves in the same way as they judge of others.

The view of human knowledge which Smith thus indicates may be broadly labelled as a contextualism. Men cannot understand things and events

unless they are brought into a context. Individual pieces of information do not form part of men's knowledge till they are formed into some kind of order.

This is, of course, not a very sharp characterization of human knowledge. The important thing is, however, that it is sharp enough to exclude a significant alternative view which we might call epistemological atomism. According to the latter knowledge consists exactly of individual pieces of information and any kind of context, any kind of order, must be built up of the individual pieces.

How clearly Smith himself saw that he was getting towards this fundamental problem situation is, of course, very doubtful and we have rather little to go by. But it is certainly remarkable in this particular connection that he at least tried to view the senses as a system which by means of mutual controls brings order in our perception of the external world.²¹

Be this last as it may, the important thing in the present inquiry is that Smith's contextualist view of human knowledge gives a better understanding of his claim that human behaviour is judged on the background of its situation, i.e. in terms of propriety. Not least, it gives us a better understanding of Smith's treatment of the influence on our judgement of what follows upon any action judged of, for in Smith's various treatments of this problem one can see it as a common general feature that there can only be such an influence, if what follows upon the action is somehow put in relation to the situation in which the action took place.²² So the basic pattern of evaluation remains the same, situational propriety. The main places where

Smith is concerned with this are his treatment of judgment in terms of merit/demerit in Part II, and his ideas of how utility influences "the sentiment of approbation", Part IV. But the theme also occurs in many other places throughout *The Theory of Moral Sentiments*.

Section 6. Merit and Demerit

Smith introduces the problem of propriety versus merit already in Part I, Section i, where he in Chapter 3, §§ 5-7 points out that men in fact judge of human behaviour and its motivation

"under two different aspects, or in two different relations; first, in relation to the cause which excites it ...; secondly, in relation to the end which it proposes, or the effect which it tends to produce. - In the suitableness or unsuitableness, in the proportion or disproportion, which the affection [behind the action] seems to bear to the cause or object which excites it, consists the propriety or impropriety, the decency or ungracefulness, of the consequent action. - In the beneficial or hurtful nature of the effects which the affection aims at, or tends to produce, consists the merit or demerit of the action, the qualities by which it is entitled to reward, or is deserving of punishment."

Smith then goes on to make the contrast between "philosophers" and men "in common life" which we noticed at the beginning of this chapter:

"Philosophers have, of late years, considered chiefly the

tendency of affections, and have given little attention to the relation which they stand in to the cause which excites them. In common life, however, when we judge of any person's conduct, and of the sentiments which directed it, we constantly consider them under both these aspects."

(I, i, 3, § 8)

The end of this quotation seems to suggest that the two principles of moral judgment are on a par and supplement each other but this impression is deceptive, for when we turn to Smith's main treatment in Part Second, 'Of Merit and Demerit', we will see that his whole point is that judgment in terms of propriety is the basic feature, whereas judgment in terms of merit is dependent upon this.

The foundation for judgments of merit and demerit is, naturally, two passions, gratitude and resentment, respectively. When an action meets with gratitude we say that there is some merit in it. If the reaction is one of resentment we say that the action has demerit. The first reaction naturally points towards reward, the second towards punishment, in a broad sense. (I, i, ch.1) Smith takes care to point out that those two kinds of reaction are always tied up with the original action in the sense that the gratitude and reward, or resentment and punishment, is always given for, or because of, the action. This distinguishes gratitude and resentment from love and hatred which are likewise passions concerned with the happiness or misfortune of others, for the two latter passions need not be felt *because of* anything specifically done to the person who feels them. (ib., §§ 5-6) This characteristic of gratitude and resentment leads directly to the heart of the matter. One can say

that when a spectator tries to evaluate a judgment of merit or demerit, he is really concerned with two actions, on the one hand the original action, and on the other hand the action consisting of a feeling of gratitude/resentment plus the consequent judgment of merit/demerit and conferring of reward or punishment. This means that the spectator can only judge the latter if he first judges the former; as the latter is a reaction to the former, the former constitutes an essential part of the *situation* in which the latter occurs. The propriety of reward or punishment is naturally to be judged of in terms of the spectator's sympathetically created, natural feelings of gratitude or resentment, (ib., ch. 2, §§ 1-3) but he can only reach this through an adequate picture of the situation and this involves a judgment of the propriety of the original action. And so, in the words of the long heading to ch. 3,

"where there is no approbation of the conduct of the person who confers the benefit, there is little sympathy with the gratitude of him who receives it: and ..., on the contrary, where there is no disapprobation of the motives of the person who does the mischief, there is no sort of sympathy with the resentment of him who suffers it." (II, i, 3).

The moral evaluation of one action is dependent upon the moral evaluation of another when the latter is part of the former's situational logic, but both evaluations are conducted by means of sympathy and in terms of propriety:

"If in the conduct of the benefactor there appears to have been no propriety, how beneficial soever its effects, it does not seem to demand, ..., any proportional recompence. ...

In the same manner we cannot at all sympathize with the resentment of one man against another, merely because this other has been the cause of his misfortune, unless he has been the cause of it from motives which we cannot enter into."

(II, i, 4, §§ 1 & 3)

This leads Smith to the conclusion that "the sense of merit [and the sense of demerit] seems to be a compounded sentiment". (II, i, 5, § 2, & cf. § 5) It involves two sympathetic moves, with two consequent moral sentiments of approval or disapproval, one for the original action and one for the reaction which consists of gratitude or resentment.

"As our sense, therefore, of the propriety of conduct arises from what I shall call a direct sympathy with the affections and motives of the person who acts, so our sense of its merit arises from what I shall call an indirect sympathy with the gratitude of the person who is, if I may say so, acted upon. - As we cannot indeed enter thoroughly into the gratitude of the person who receives the benefit, unless we beforehand approve of the motives of the benefactor, so, upon this account, the sense of merit seems to be a compounded sentiment, and to be made up of two distinct emotions; a direct sympathy with the sentiments of the agent, and an indirect sympathy with the gratitude of those who receive the benefit of his actions." (II, i, 5, §§ 1-2)

And equally in the negative case, the case of demerit, there are

"two distinct emotions; a direct antipathy to the sentiments of the agent, and an indirect sympathy with the resentment of the sufferer." (ib. § 5)

Smith's distinction between direct and indirect sympathy here may seem somewhat curious. As far as I can see, all there is to it is that in order to reach the indirect sympathy and its attending evaluation, one has to go through the direct sympathy and its attending evaluation.

We can conclude that Smith stays firmly within his theory of moral evaluation in terms of propriety by this dissolution of judgments in terms of merit/demerit into two propriety-judgments. But we can conclude more than that. Smith's analysis shows that the moral evaluation of the motives behind the original action is independent of whether or not the action in fact results in invoking gratitude/resentment in those who are affected by the action. When we judge we try to do so as independent spectators, i.e. in terms of our own sympathetically created feelings of gratitude/resentment and not in terms of the actual feelings of gratitude/resentment in others.

We must, however, be wary of inferring from this that moral judgment, according to Smith, is solely in terms of propriety without any influence from regard to consequences. His theory is much more subtle than that. In order to reach an understanding of it, we must proceed to an analysis of Part IV, 'Of the Effect of Utility upon the Sentiment of Approbation.'

Section 7. The Role of Utility

Part IV is one of the most intricate pieces of argument in the whole book. It is divided into two chapters; in the first Smith introduces the problem by showing what influence utility has on our evaluation of

"all the Products of Art" while he in the second transfers the discussion to moral evaluation. He starts off by a presentation of what he takes to be Hume's idea of utility, as a means to happiness, and of his idea of how utility pleases "by perpetually suggesting", through the imagination, this pleasant end-result which the useful object of evaluation "is fitted to promote", and he reminds us of how this becomes a common standard for evaluation through spectator sympathy. (IV, 1, §§ 1-2)

By presenting Hume's views in this way Smith clearly shows that he did not think that Hume distinguished between the two meanings of utility which his dual use of the concept led us to suspect that he was getting at, namely means-utility and end-utility (see above Chapter II, Section 10). Furthermore, Smith himself does not clarify this distinction. For him the concept of utility encompasses both means and ends, but it should be noticed that the ends are never dealt with as anything of specific importance, let alone presented as of any particular content. This is a point of significance when we come to deal with the relationship between justice and utility below.

In a way it is puzzling that Smith does not achieve this clarification of the concept of utility for he clearly has, as it were, the means to do so. This is demonstrated throughout Part IV. His strategy is first to criticize Hume for not distinguishing between the influence of means and the influence of ends in our evaluations and for operating with utility, in the sense of means-and-ends. Nevertheless, he never connects these two points into a distinction between two senses of "utility". He then devotes the bulk of Part IV to showing the importance of distinguishing between means and ends for the understanding of,

first, aesthetic evaluation, then, moral evaluation. Taken in that order Smith's argument proceeds as follows.

Although Hume is quite right that we often conduct our evaluation of artificats by reference to the value of the end they produce, it has generally been overlooked that very often the end itself is out of view and the evaluation proceeds entirely in terms of the means. That is to say, we judge a thing in terms of its goal-directedness without considering the goal, in terms of how well-contrived it is without taking into regard what it is contrived for:

"But that this fitness, this happy contrivance of any production of art, should often be more valued than the very end for which it was intended; and that the exact adjustment of the means for attaining any conveniency or pleasure should frequently be more regarded than that very conveniency or pleasure, in the attainment of which their whole merit would seem to consist, has not, so far as

I know, been yet taken notice of by anybody." (ib. § 3)

Smith first illustrates this with three well-known and rather charming examples of an "aesthetic" character; the man who absolutely must replace the chairs, the man who cannot get his watch precise enough, and the "many people [who] ruin themselves by laying out money on trinkets of frivolous utility". (ib. §§ 4-6) In all cases the general aim is lost view of and the system and order of the means is regarded as the main thing. This has been called "value-displacement".²³ In so far as this is taken as a literal description it may be rather unfortunate; it may very well be the case that no actual

dis-placement takes place, if by this is meant a process of switching from a view of the goal to a view of the means. The goal may never actually have been clearly to mind for any individual. This is shown by the following, much more important illustration. Smith simply argues that most of the striving for social betterment that goes on in society and which takes its beginning already from childhood and youth is motivated by "the same love of system, the same regard to the beauty of order, of art and contrivance", rather than by any clear view of what it is all supposed to lead to. (ib. § 8) This is his theory of vanity which is the focal point for some of the most important themes in Smith, including the idea of the mechanism that makes society a continuous process. We will store these themes for later commentary and just take those important paragraphs (8-10) as illustrating the structure of an important species of human evaluation.

As if it was not enough for Smith to suggest to us the parallel between the replacement of chairs and social mobility in the broadest sense, his concluding paragraph allows us to see the parallel between "frivolous trinkets" and the political institutions of society, as far as the mode of their evaluation is concerned, that is. The latter are also often judged more with a view to whether they constitute a "grand system" or not than whether they

"tend to promote the happiness of those who live under them.

This is their sole use and end. From a certain spirit of system,²⁴ however, from a certain love of art and contrivance, we sometimes seem to value the means more than the end, and to be eager to promote the happiness of our fellow-creatures,

rather from a view to perfect and improve a certain beautiful and orderly system than from any immediate sense or feeling of what they either suffer or enjoy." (ib. § 11)

This idea of evaluation in terms of means, rather than the end to which the means lead, is a prime example of what I above called Smith's contextualism. Men understand a thing in terms of the immediate order, system, situation, in which it occurs, rather than in terms of what is more remote. This is so much so that it even takes place with small things which are plainly directed towards a limited and easily understood aim, like showing the time. Can one wonder that it happens with a trinket like the state?

This particular example carries elegantly over into the following chapter 2 where Smith starts by making the point that, since various institutions in civil society serve to make up for deficiencies in human nature and since such institutions are evaluated according to how useful they are in creating happiness, it might be thought that the virtues which could make the institutions redundant, if such virtues were the rule among men, would be evaluated in the same way. In other words, Smith presents Hume's idea that human character and its motives are judged in terms of their tendency to be useful or harmful.

(IV, 2, §§ 1-2) Here follows Smith's second great "But" to Hume in this context. This theory of moral judgment in terms of the tendency of the character judged of is, says Smith, a philosopher's construction and not a viable theory of how men in fact judge.

In order to carry this criticism through Smith invokes his contextualism to good measure. When the philosopher looks upon human behaviour

he does so from a general and abstract point of view. He relates characters and motives to their tendencies and evaluates and classifies them accordingly. This, however, inevitably leads him to neglect the situation, the context, in which the particular character functions in each individual case and it is precisely in terms of this context that men in common life judge morally. Moral judgment is a particular judgment, not a general and typifying judgment. The general consideration of tendencies and effects is an afterthought which may come in later and which may gain some influence, but it is bound to be as an influence upon situational judgment which must remain the basic thing. (ib. § 3) It is thus Smith's contextualism that is the real background to his criticisms of Hume's "Philosopher's mistake":

"This beauty and deformity which characters appear to derive from their usefulness or inconveniency, are apt to strike in a peculiar manner those who consider, in an abstract and philosophical light, the actions and conduct of mankind. When a philosopher goes to examine why humanity is approved of or cruelty condemned, he does not always form to himself, in a very clear and distinct manner, the conception of any one particular action either of cruelty or of humanity, but is commonly contented with the vague and indeterminate idea which the general names of those qualities suggest to him. But it is in particular instances only that the propriety or impropriety, the merit or demerit, of actions is very obvious and discernible. It is only when particular examples are given that we perceive distinctly either the concord or disagreement between our own affections and those of the agent, or

feel a social gratitude arise towards him in the one case, or a sympathetic resentment in the other. When we consider virtue and vice in an abstract and general manner, the qualities by which they excite these several sentiments seem in a great measure to disappear, and the sentiments themselves become less obvious and discernible. On the contrary, the happy effects of the one, and the fatal consequences of the other, seem then to rise up to the view, and, as it were, to stand out and distinguish themselves from all the other qualities of either." (IV, 2, § 2)

I think we can now see Smith's general strategy in Part IV. He begins by pointing out that Hume is right in his theory of evaluation in so far as artificial things are concerned. We do in fact to a large extent judge such objects in terms of their "utility", i.e., as Smith reads Hume, their tendency to create happiness. But even here it is important to distinguish between what we have called means-utility and end-utility, for it is the former which determines our evaluation much more than the latter. In other words, it is more the immediate context than the more distant, possible result that is determining. He then goes on in Chapter 2 to say that in judgments of human character, i.e. in moral judgment, the grip of the context is even firmer and the inspiration of the end even fainter.

He spends the rest of the chapter backing up this conclusion about moral judgment by making two considerations. The first takes up seven lines, the second more than eleven pages, and yet it would be a bold man who would say which is the more important. The first reads as little more than a mere assertion:

"first of all, it seems impossible that the approbation of virtue should be a sentiment of the same kind with that by which we approve of a convenient and well-contrived building; or, that we should have no other reason for praising a man than that for which we commend a chest of drawers." (ib. § 4)

The "convenient and well-contrived building" which appears here is a reference to Hume's *Treatise*, p. 617, where "a convenient house" also appears and this little paragraph is a contention of a central theme in Hume's theory. In the *Treatise*, p. 617, and, in greater detail, pp. 471-73,²⁵ Hume tries to face up to the problem Smith mentions in the quotation above:

"if virtue and vice be determin'd by pleasure and pain, these qualities must, in every case, arise from the sensations; and consequently any object, whether animate or inanimate, rational or irrational, might become morally good or evil, provided it can excite a satisfaction or uneasiness."

(T. 471)

His answer is, briefly, that although there is a sufficient family resemblance between the various kinds of pleasure and pain "to make them be expressed by the same abstract term", (T. 472) the pleasure and pain attending moral judgment are, as a matter of empirical fact, distinct:

"a convenient house, and a virtuous character, cause not the same feeling of approbation; even tho' the source of our approbation be the same, and flow from sympathy and an idea of their utility. There is something very inexplicable in this variation of our feelings; but 'tis what we have experience of with

regard to all our passions and sentiments." (T. 617)

Smith did not find "this variation of our feelings" so "very inexplicable". Although he would agree with Hume that both evaluations of artifacts and evaluations of moral matters are pleasant or painful²⁶, he would claim that he could explain their differences by detailing the difference in their causes. The former is plainly the pleasure/pain of utility/disutility. The latter, the pleasure/pain of moral approval/disapproval, is obviously the pleasure/pain of agreement/disagreement between spectator and agent, and such agreement or disagreement is only to be found through a sympathetic inquiry into the situation of the person principally concerned, i.e. through understanding of his background and context. When Hume, therefore, points out that,

"'Tis only when a character is considered in general, without reference to our particular interest, that it causes such a [peculiar] feeling or sentiment, as denominates it morally good or evil", (T. 472)

Smith would quite agree, but he would at the same time point out that such a general and impartial point of view is reached through sympathetic understanding of another's situation and not through understanding of useful tendencies in the character concerned.²⁷ It is, I think, in this sense we must understand Smith's statement at the end of the second chapter of Part IV,

"that so far as the sentiment of approbation arises from the perception of this beauty of utility, it has no reference of any kind to the sentiments of others". (ib. § 12)

It is not the useful tendency as such that interests us in, or refers us to, others; but when we, through social life, (see the rest of § 12)

in fact have got an interest in others, by means of mutual sympathy, then utility can gain moral importance. This is what Smith can hide under the cloak of a mere assertion.

His second way of arguing against the idea that the useful tendency of characters and motives is the basis for moral evaluation is to show that the qualities of the human mind which are in fact useful either to the person himself or to his fellow men are rarely judged in terms of this as "the first ground of ... approbation". (ib. § 5) He does this by taking up a number of examples where those qualities (reason and self-command; humanity, justice, generosity, and public spirit) are approved of, not because of any useful tendency, and often in spite of harm to the persons themselves, but because they meet with the approval of the actual and/or the impartial spectator(s). The motive for moral behaviour is not utility but spectator-approval and, if possible, the spectator-praise and admiration which follow when we are able to surprise the spectator and make him wonder through an exertion above the normal and expected. (ib. §§ 7-11)

Part IV constitutes a formidable piece of argument against utility as a source of moral evaluation, but Smith takes care not to overstate his case. He does not say that consideration of utility has no influence upon moral judgment. What he says is:

"that it is not the view of ... utility or hurtfulness which is either the first or principal source of our approbation and disapprobation". (ib.. § 3)

The question is, then, *how* does consideration of utility come to influence moral judgment, and thus behaviour? This is one of the most

exciting questions one can ask in connection with Smith for it opens up a most extraordinary theoretical construction. Let us however take one step at a time and the small ones first. Smith's immediate answer to our question is simply that the idea of utility is an "afterthought". (cf. I, i, 4, § 4) The useful tendency of a human character or action is something we can recognize after the event and this recognition may thus strengthen our original judgment which was based upon propriety:

"utility, when we come to view it, bestows upon [moral actions] undoubtedly a new beauty, and upon that account still further recommends them to our approbation." (IV, 2, § 11)

But this recognition of the utility of moral behaviour is not a common thing in men's moral judgments. It is a kind of abstraction because it (as mentioned earlier) goes beyond the context in which the action occurs and it is, therefore, more a matter for philosophical speculation:

"This beauty, however, is chiefly perceived by men of reflection and speculation, and is by no means the quality which first recommends such actions to the natural sentiments of the bulk of mankind" (continuation of *op. cit.*).²⁸

Such philosophical speculation will, however, be evoked not only by pure philosophical curiosity but also when moral judgments are challenged²⁹, a theme we will return to in connection with justice. Presumably regard to utility will come into men's moral outlook from both sources, functioning as a support for their ordinary moral judgment in terms of situational propriety. The reality of this influence is touched upon a number of times by Smith. Thus he does e.g. in his treatment of the broad classes of virtue in Part VI point out that,

"In our approbation of all those virtues [of prudence, justice,

and beneficence], our sense of their agreeable effects, of their utility, either to the person who exercises them or to some other persons, joins with our sense of their propriety, and constitutes always a considerable, frequently the greater, part of that approbation. - But in our approbation of the virtues of self-command, complacency with their effects sometimes constitutes no part, and frequently but a small part, of that approbation." (VI, Conclusion, §§ 6-7)

Moreover when Smith in Part VII criticizes Hutcheson's moral sense theory he points out that the following four sources of moral evaluation seem to be exhaustive, not leaving room for any special moral sense:

1) judgment of the propriety of the motives of the agent; 2) judgment of the propriety of the motives of the patient; and then two supporting sources: 3) the general rules formed out of, and afterwards to some extent regulating, judgments of propriety, and 4) regard to the useful tendency of motives and actions. (VII, iii, 3, § 16)

Utility is a real source of moral judgment, although a secondary one. But in what sense secondary? Here the parallel with general rules is suggestive. Just as the general rules, as we noted earlier, arise out of individual actions which are judged morally in terms of situational propriety, so useful consequences tend to follow from such moral actions. In both cases this unforeseen product of moral behaviour and judgment is only recognized afterwards and it is only then that it comes to have an influence on moral judgment and behaviour.

Clearly Smith is here making the enormous presupposition that moral behaviour does in fact tend to have useful consequences in the world as

we know it. This is, however, not merely a presupposition in Smith, it is an explicitly stated doctrine.³⁰ When men act in the morally proper way the outcome of such behaviour is, in general, of a useful tendency. Or, to put it bluntly, by and large virtue pays in this world:

"virtue is upon all ordinary occasions, even with regard to this life, real wisdom, and the surest and readiest means of obtaining both safety and advantage." (VII, ii, 2, § 13)

We may take this as a rather extreme case of Enlightenment optimism or as one of the traditional teleological non-explanations of natural theology. We may also look closer at the text, for Smith goes on in the following manner:

"Our success or disappointment in our undertakings must very much depend upon the good or bad opinion which is commonly entertained of us, and upon the general disposition of those we live with, either to assist or to oppose us. But the best, the surest, the easiest, and the readiest way of obtaining the advantageous and of avoiding the unfavourable judgments of others, is, undoubtedly, to render ourselves the proper objects of the former and not of the latter." (ib.)

Men are bound to live in society and in most of their doings they are dependent upon the assistance of their fellow men, at least in the minimal sense that the latter do not obstruct their activity, and often in the sense of positive help. To have this condition fulfilled is one of the greatest advances towards success in one's actions. To obtain this it is, however, necessary to reach some conformity with one's fellows about the way in which one can go about one's business.

Since such conformity is sought from all sides, it amounts to an adaptation which renders the behaviour of individuals as compatible as possible. This seeking of conformity in the outlook upon behaviour is, as we know, reached by means of mutual sympathy and, as we also know, mutual sympathy has a tendency to gravitate towards a common, impartial standpoint, or at least to create the idea, and ideal, of such a standpoint. Obviously, the more this impartial standpoint is followed, the more compatible will the behaviour of individuals become; which is just another way of saying that the more people pursue their various aims in accordance with the impartial spectator's standards of virtuous propriety, the less resistance, and the more assistance, will they meet from their fellows, i.e. the more useful will they be to themselves and to their fellow men. Optimism or not, Smith certainly has an explanation to offer.

Smith is, however, not unduly optimistic. What he is saying is that unless men *in general* approached moral behaviour pretty closely and unless this *in general* led to successful results, it would simply be impossible to understand how society, and thus mankind, could survive (cf. V, 2, §16); but this does, of course, not preclude that this may not be the case in individual instances and in particular kinds of behaviour (see V, 2, §§ 12-16, and III, 5, § 8).

Section 8. The Role of Religion

If one still finds Smith too optimistic and unrealistic because it is difficult to understand how disappointments in individual cases should not be enough to cause a more widespread breakdown of morality and thus of society, then one should remember two further features of his theory.

First of all, the theory of the impartial spectator is, in a way, a theory of how the reaction to such disappointments can be internalized. In cases where the virtue of a way of behaving is not understood and appreciated by the surrounding society, man has, at least to a certain extent, the ability to take up the standpoint of the impartial spectator which gives him the possibility of gaining the approval of the "man within" independently of the judgment of the "man without". This approval can function as a compensation and consolation for lost opportunities in the social world. (III, 2, § 32, and II, iii, 3, § 6)

Secondly, if this is not enough, man has "an appeal to a still higher tribunal", to God. (Ib. § 33, and VII, ii, 1, § 45)

When Smith's theology is touched upon the sympathy of most commentators seems to become very weak indeed, but again I recommend caution and a close reading of what he has to say. Let us begin with a rather central formulation:

"When we ... despair of finding any force upon earth which can check the triumph of injustice, we naturally appeal to heaven, and hope that the great Author of our nature will himself execute hereafter, what all the principles which he has given us for the direction of our conduct prompt us to attempt even here; that he will complete the plan which he himself has thus taught us to begin; and will, in a life to come, render to every one according to the works which he has performed in this world. And thus we are led to the belief in a future state, not only by the weaknesses, by the hopes and fears of human nature, but by the noblest and best principles which belong

to it, by the love of virtue, and by the abhorrence of vice and injustice." (III, 5, § 10)

The first thing to note about religious belief is that it is a consequence of, a function of morality. Men believe in God and an after-life because they are led to it by their moral convictions. The former is a continuation and completion of the latter and religion thus becomes a strong support of morality, "religion enforces the natural sense of duty." (ib. § 13)³¹ This idea of religion as primarily a function and continuation of morality is so striking in Smith, that it seems reasonable to call his view moral theology, with due respect for Kant and no wish to make a comparison in the present context.

There is, however, more to Smith's theology than that. When one goes through all the theological passages in *The Theory of Moral Sentiments*, it stands out as a striking feature in many, if not most, of them that he is really proposing a theory of human nature. Phrases like "we naturally appeal", "we are naturally led to believe", "nature teaches us to hope", "a hope and expectation deeply rooted in human nature", "the natural principles of religion", etc. abundantly show this to be his intention. With a bit of care I think we can spell out this theory. We have already noted Smith's idea of religious belief as a continuation and completion of moral sentiments, and in the quotation already given on the previous page we heard that men "naturally ... hope that the great Author of our nature ... will complete the plan which he himself has taught us to begin". Elsewhere we hear that men can only give universal benevolence on the supposition that this contributes to, or is part of, a great universal system of happiness

supervised by God. (VI, ii, 3, § 2) All this, of course, shows that religious belief is yet another example of the contextualism which Smith sees as the hallmark of human knowledge. Many, or most, aspects of moral life seem incomplete, unfinished, and for man, whose nature it is to seek order, system, coherence, in order to understand, this naturally leads to a belief in a completion beyond the present life and a divine guarantor of universal order.

It thus seems clear that Smith proposes a naturalistic theory of religious belief and that this theory is part and parcel of his theory of moral sentiments which again is part of a broader conception of human knowledge. This naturalistic character of Smith's theory is confirmed by the charming bits of a natural history of religion which he gives away, e.g. in the well-known few lines that replaced the so-called atonement-passage:

"The justice of God, ..., we think, still requires, that he should hereafter avenge the injuries of the widow and fatherless, who are here so often insulted with impunity. In every religion, and in every superstition that the world has ever beheld, accordingly, there has been a Tartarus as well as an Elysium; a place provided for the punishment of the wicked, as well as one for the reward of the just."

(II, ii, 3, § 12)

Although Smith thus can account for religion in terms of natural principles, we must note that he always makes it quite clear that religion is speculation and philosophy just as the consideration of utility is. It seems as if his meaning is that it is most natural and common, when it occurs as the continuation of individual cases, whereas it is a

philosopher's construction when it appears as a system. However that may be, he insists that religion is not, and ought not to be, concerned with action. It is a matter of consoling contemplation:

"Nature has not prescribed to us this sublime contemplation as the great business and occupation of our lives. She only points it out to us as the consolation of our misfortunes."
(VII, ii, 1, § 46)

The only way it has to do with action is as a strengthening factor upon our natural sentiments of morality, which is, of course, just another way of saying that man's life and morality constitute an independent sphere which is governed by its own natural principles:

"The administration of the great system of the universe, ... the care of the universal happiness of all rational and sensible beings, is the business of God, and not of man. To man is allotted a much humbler department, but one much more suitable to the weakness of his powers, and to the narrowness of his comprehension - the care of his own happiness, of that of his family, his friends, his country ... The most sublime speculation of the contemplative philosopher can scarce compensate the neglect of the smallest active duty."
(VI, ii, 3, § 6)³²

Religion is a more or less philosophical speculation which is naturally superimposed upon men's natural sentiments of morality, more so for some men than for others. But to substitute the former for the latter, as monks try to do, (III, 2, § 34) is contrary to nature and therefore ruled out for the bulk of mankind. In other words, men's religious beliefs are themselves selected according to natural principles:

"To compare ... the futile mortifications of a monastery, to the ennobling hardships and hazards of war; to suppose that one day, or one hour, employed in the former should, in the eye of the great Judge of the world, have more merit than a whole life spent honourably in the latter, is surely contrary to all our moral sentiments; to all the principles by which nature has taught us to regulate our contempt or admiration. It is this spirit, however, which, while it has reserved the celestial regions for monks and friars, or for those whose conduct and conversation resembled those of monks and friars, has condemned to the infernal all the heroes, all the statesmen and lawgivers, all the poets and philosophers of former ages; all those who have invented, improved, or excelled in the arts which contribute to the subsistence, to the conveniency, or to the ornament of human life; all the great protectors, instructors, and benefactors of mankind; all those to whom our natural sense of praiseworthiness forces us to ascribe the highest merit and most exalted virtue." (III, 2, § 35)

Could anything be more like Hume's denouncement of "the whole train of monkish virtues"? (*Enquiry*, 270) And could the reasoning behind it be any more similar to Hume's idea of "artificial lives and manners"? (*A Dialogue*, 340-43)

Just like Hume, Smith never makes clear his own personal attitude to the religious hypothesis. He limits himself to pointing out that men's teleological inferences about God and an afterlife are conducted along

the same lines as the rest of human understanding but that it is purely speculative. He does not say that such speculation is invalid. From the tone of various of his passages one may get the feeling that he has brought Hume's criticism of such inferences thoroughly home to himself. His insistence upon the great gulf between the world of religion and the world of human action seems to indicate this. Indeed, one might say that Smith's insistence upon this gulf as far as the *praxis* of life is concerned brings men fully as close to a Kierkegaardian "leap-of-faith" view of religion as does Hume's criticism of religion.³³ Whether either of them wanted to make the leap remains unknown.

The really important thing is, however, that it is irrelevant whether one wants to take the leap or not as far as moral theory and understanding is concerned. Nothing hinges on teleological explanations and thus on a guarantor of a teleological order. I think it is safe to say that wherever a piece of teleology turns up in Smith it is fairly clear where we have to look in order to find a "real" explanation in terms of what we may broadly call efficient causes. We have already seen this done with large areas of human behaviour and we have been able to read off Smith's philosophical principles in this matter from his explanatory practice. We need, however, not rest content with this, for he does very clearly and forcefully formulate his views of explanation.

Section 9. Teleology

In dealing with the problem of teleological explanations Smith starts off from the assumption that men do in fact perceive a teleological order in the universe in general and in the physical world in particular. Whether this is true is, of course, doubtful; it may well have been more true about 18th Century men than it is about 20th Century men; but irrespective of this, it clearly serves the rhetorical purpose of throwing in relief his criticism of teleology as a mode of explanation:

"In every part of the universe we observe means adjusted with the nicest artifice to the ends which they are intended to produce; and in the mechanism of a plant, or animal body, admire how every thing is contrived for advancing the two great purposes of nature, the support of the individual, and the propagation of the species." (TMS, II, ii, 3, § 5)

One thing is, though, the general order which may be perceived by men, or, rather, by certain men, the philosophers; another thing is to *explain* the operation of the individual parts and thus the order. So Smith goes on:

"But in these, and in all such objects, we still distinguish the efficient from the final cause of their several motions and organizations. The digestion of the food, the circulation of the blood, and the secretion of the several juices which are drawn from it, are operations all of them necessary for the great purposes of animal life. Yet we never endeavour to account for them from those purposes as from their efficient causes, nor imagine that the blood circulates, or that the food digests of its own accord, and with a view

or intention to the purposes of circulation or digestion.

The wheels of the watch are all admirably adjusted to the end for which it was made, the pointing of the hour. All their various motions conspire in the nicest manner to produce this effect. If they were endowed with a desire and intention to produce it, they could not do it better. Yet we never ascribe any such desire or intention to them, but to the watch-maker, and we know they are put into motion by a spring, which intends the effect it produces as little as they do." (Ib.)

In other words, in Smith's opinion the methodological discussion in his day had reached clarity about the distinction between the contemplation of order and the explanation of function as far as the physical world was concerned. But such clarity was far from achieved in moral matters. Here the perception of order was still so dominating that the philosophical inquirer transferred it from his own speculation onto the individuals inquired into as their principle of action.

"But though, in accounting for the operations of bodies, we never fail to distinguish in this manner the efficient from the final cause, in accounting for those of the mind, we are very apt to confound these two different things with one another. When by natural principles we are led to advance those ends which a refined and enlightened reason would recommend to us, we are very apt to impute to that reason, as to their efficient cause, the sentiments and actions by which we advance those ends, and to imagine that to be the wisdom of man, which in reality is the wisdom of God." (Ib.)

As stated thus far this is essentially a negative doctrine. It is a

denial that human reason is a power which can shape or construct the basic outlines of human life. Smith is, however, aware of this, as is implied in all the above quotations concerning the contrast between final and efficient causes, and, indeed, one can see it as his main purpose to fulfil the positive task of pointing out the efficient causes which create order in human life. He starts from the foundation of men's existence, their mere physical survival:

"With regard to all those ends which, upon account of their peculiar importance, may be regarded, if such an expression is allowable³⁴, as the favourite ends of nature, she has constantly ... not only endowed mankind with an appetite for the end which she proposes, but likewise with an appetite for the means by which alone this end can be brought about, for their own sakes, and independent of their tendency to produce it. Thus self-preservation, and the propagation of the species, are the great ends which nature seems to have proposed in the formation of all animals. Mankind are endowed with a desire of those ends, and an aversion to the contrary; with a love of life, and a dread of dissolution; with a desire of the continuance and perpetuity of the species, and with an aversion to the thoughts of its entire extinction. But though we are in this manner endowed with a very strong desire of those ends, it has not been entrusted to the slow and uncertain determinations of our reason, to find out the proper means of bringing them about. Nature has directed us to the greater part of these by original and immediate instincts. Hunger, thirst, the passion which unites the two sexes, the love of

pleasure, and the dread of pain, prompt us to apply those means for their own sakes, and without any consideration of their tendency to those beneficent ends which the great Director of nature intended to produce by them." (II, i, 5, § 10)

Smith's real feat as a philosopher is, of course, to point out that exactly the same applies to man's social life and to have worked out a theory of the efficient cause which, so to speak, can take the place of the kind of constructive rationality which he denies is a basic feature of mankind. This is the theory of mutual sympathy as a selection mechanism of behaviour, which renders social life possible.

"Though man ... be naturally endowed with a desire for the welfare and preservation of society, yet the Author of nature has not entrusted to his reason to find out that a certain application of punishments is the proper means of attaining this end; but has endowed him with an *immediate and instinctive approbation* of that very application which is most proper to attain it." (Op. cit., my italics)

All this amounts to a proper philosophy of unintended consequences: the idea that when men act on their own individual purposes, guided by the ordinary principles of human nature, something unforeseen and far beyond those purposes emerges, and this something will afterwards become recognizable as some kind of order. Smith is spelling out fully this theory which Hume took the major steps to erect through his treatment of the origin of justice.

The thing which brought Smith to greater clarity in this matter than Hume was his clarification of the relative importance of the means-perspective and the end-perspective in our moral judgments of actions

and characters. Once he got rid of Hume's troublesome concept of utility and replaced it with his own idea of situational propriety as the basic element in moral reasoning, he had a much clearer view of the role of reason in human action and hence in our explanation of human behaviour. Accordingly we never find the same difficult tensions in Smith's theory which we found in Hume's between the rationally created and the unintentionally occasioned. But then Smith never involves himself in a discussion of the distinction between natural and artificial which we hypothesized might be part of the explanation of Hume's difficulties. Whether Smith had any clear ideas of this or whether the logic of the discussion pressed him into an unintended clarity, we do not know.

Section 10. Pleasure, Pain, and Utopianism

The two passages where Smith criticizes teleological explanations explicitly (II, i, 5, § 10 and II, ii, 3, § 5), which I have dealt with above and quoted extensively from, occur in connection with his theory of justice and that is surely no coincidence. Nowhere is his theory of the "efficient cause" which selects behaviour clearer and of greater importance than in his account of how just behaviour is selected.

Justice was something of an enigma to both Hume and Smith. Although neither of them set out with the primary aim of formulating a theory of justice in their major philosophical work, both of them gave considerable space to such a theory and both of them kept referring to it in other contexts. The thing which struck them was that justice is so different from all other virtues. It seemed to be more precise and it

could therefore be formulated in strict and general rules. Furthermore, men were always prone to enforce those rules. Now, what I suggest is that Smith had a highly original theory of why justice is so precise and, in close connection with this, why it is enforceable.

It may appear as a piece of the high-handed cynicism about man's lot in the world which he always criticizes in the Stoics, when Smith maintains that basically the bulk of mankind is in a position to be happy.³⁵

I will not deny that there may be an element of this in it, but this should not, as is common, obscure to us that he also puts forward an interesting theory about this matter. Surely, the point he is making is that it is rather difficult to say much in general terms about what is needed to make mankind happy and the reason is that the difference between "the happiness of the man who is in health, who is out of debt, and has a clear conscience" and "the highest pitch of human prosperity" is "but a trifle". (I, iii, 1, §§ 7-8) This trifle is traversed by men, not out of any basic needs, (I, iii, 2, § 1) but under the guidance of vanity, (I, iii, 2, § 8; IV, 1, §§ 8 & 10) a principle which is as changing in its contents, as it is permanent in its influence with mankind. In contrast to this narrow scope for happiness the possible depths of misery are "immense and prodigious". (I, iii, 1, § 8) This fundamental asymmetry between happiness and misery is connected with the fact that,

"Pain ..., whether of mind or body, is a more pungent sensation than pleasure, and our sympathy with pain, though it falls greatly short of what is naturally felt by the sufferer, is generally a more lively and distinct perception than our sympathy

with pleasure, though this last often approaches more nearly ...
to the natural vivacity of the original passion." (I, iii, 1,
§ 3)³⁶

Pain makes a greater impact than pleasure upon the person principally concerned, and there is also a difference in the communication of the two, although that is rather more complicated. Sympathy with pleasure and joy is in itself pleasant, while sympathy with pain and sorrow is unpleasant³⁷; we therefore have a natural tendency to like the former and dislike the latter. (I, iii, 1, §§ 5 & 9) On the other hand sympathy with pleasure is something of an "either/or" phenomenon: if we do not sympathize completely, it is not really sympathy (ib. §2). Sympathy with pleasure is a lively, but fickle kind of sympathy. Sympathy with pain and sorrow, on the contrary, is much more resilient; although it is often not so close to the original feeling in vivacity, it is always present in some degree:

"our sympathy with sorrow is, ... more universal, than that with joy". (ib. §2)

The fact that the difference between "what may be called the natural state of our happiness" (III, 2, § 15) and "the highest pitch of human prosperity" "is but a trifle", (I, iii, 1, § 8) plus the fact that it is pleasant for one in the former condition to go along with one in the latter condition, are the reasons why this kind of sympathy is more complete and the sympathetic feeling closer to the original. By contrast the fact that "the distance is immense and prodigious" between the state of natural happiness and "the lowest depth of misery" (I, iii, 1, § 8) means that sympathy with the latter condition is much more strongly desired by one in that condition.

"It is to be observed ... that we are still more anxious to communicate to our friends our disagreeable, than our agreeable passions; that we derive still more satisfaction from their sympathy with the former, than from that with the latter, and that we are still more shocked by the want of it. ... The agreeable passions of love and joy can satisfy and support the heart without any auxiliary pleasure. The bitter and painful emotions of grief and resentment more strongly require the healing consolation of sympathy." (I, i, 2, §§ 3 & 5)

So although sympathy with pain and sorrow is disagreeable it is universally desired. This means that it becomes a social necessity that an emotional compromise is established through mutual sympathy. (I, iii, 1, §§ 12-15)

The idea that pain and misery is more pungently felt than pleasure and happiness and that sympathy with the former is more distinct and universal is of the greatest importance in Smith. For one thing it seems to be behind the indications of a political theory he gives now and then. Thus when he attacks the "men of system", (VI, ii, 2, §§ 14-18) one of his main points is that they try to create a complete happiness instead of trying to alleviate concrete misery. They

"seldom fail to hold out some plausible plan of reformation, which, they pretend, will not only remove the inconveniencies and relieve the distresses immediately complained of, but will prevent in all time coming any return of the like inconveniencies and distresses." (VI, ii, 2, § 15)

Smith points out that this is an expression of extreme intellectual arrogance:

"The man of system ... is apt to be very wise in his own conceit, and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it." (ib. § 17)

This he then goes on to illustrate with the famous chess-board analogy, the real point of which, of course, is that the knowledge which the rulers of a society can have about the citizens is very limited indeed and that the laying down of rules for the latter is correspondingly difficult.

The man of system is to be contrasted with the man of real public spirit:

"He will accommodate, as well as he can, his public arrangements to the confirmed habits and prejudices of the people, and will remedy, as well as he can, the inconveniencies which may flow from the want of those regulations which the people are averse to submit to. When he cannot establish the right, he will not disdain to ameliorate the wrong; but, like Solon, when he cannot establish the best system of laws, he will endeavour to establish the best that the people can bear."

(ib. § 16)

This criticism of utopianism and suggestion of its replacement with the piecemeal alleviation of concrete evils³⁸ does, of course, fit in nicely with Smith's criticism of any kind of utility-interpretation of human morality. One can simply understand utopianism as a political exploitation of the latter. It is a philosopher's construction which

is excessively speculative and does not respect the concrete situations in which individual men in fact act. A piecemeal approach in politics which does not aim much higher than to remedy given evils will, by contrast, respect those individual situations to as high a degree as is possible, for it will only be guided by those elements in the situations which are most "pungently" felt and which are most "universally" and "distinctly" sympathized with, namely pain and misery.³⁹

This criticism of excessive rationalism, or utopianism, in politics must not be misunderstood. The intention is not the abdication of reason but rather a realization of its limits. Political philosophy is still necessary to formulate and give consistency to political ideals. The utopian mistake is to think that such principles are sacrosanct in action:

"Some general, and even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist upon establishing, and upon establishing all at once, and in spite of all opposition, every thing which that idea may seem to require, must often be the highest degree of arrogance. It is to erect his own judgment into the supreme standard of right and wrong. It is to fancy himself the only wise and worthy man in the commonwealth, and that his fellow-citizens should accommodate themselves to him, and not he to them." (VI, ii, 2, § 18)

This does, in its turn, presuppose that there are some quite fundamental, or "natural", principles which universally aim at the protection of each man in his individuality and which, therefore, render utopianism into "the highest degree of arrogance". This is exactly Smith's

meaning. The fundamental, or natural, "laws of justice" are exactly such principles *and* they are founded upon the "primacy of the negative" in morals, the primacy of pain, misery, unhappiness.

Section 11. Positive and Negative Virtues

It is no surprise to find that the contrast between "the positive" and "the negative" in morals is the theme with which Smith opens his discussion of justice. What he does is to compare beneficence and justice. (II, ii, 1) He does so through a comparison of the *lack* of either and the reactions to this:

"the mere want of beneficence tends to do no real positive evil. It may disappoint of the good which might reasonably have been expected, and upon that account it may justly excite dislike and disapprobation: it cannot, however, provoke any resentment which mankind will go along with."

(II, ii, 1, § 3)

The man who does not show beneficence can at most be

"the object of hatred, a passion which is naturally excited by impropriety of sentiment and behaviour; not of resentment, a passion which is never properly called forth but by actions which tend to do real and positive hurt to some particular persons." (ib.)

And accordingly,

"Beneficence is always free, it cannot be extorted by force, the mere want of it exposes to no punishment". (ib.)

So much for the positive side. But there is a negative correlate:

"There is, however, another virtue, of which the observance is not left to the freedom of our own wills, which may be extorted by force, and of which the violation exposes to resentment, and consequently to punishment. This virtue is justice: the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment." (ib. §5)

The whole distinction between the two virtues is thus drawn in terms of the reactions, first of the patient, afterwards of the spectator, to the lack of them, and the point is that the lack of justice "does real and positive hurt" while the lack of beneficence does not.⁴⁰ Hence the former meets with a much clearer and stronger response than the latter, with resentment rather than hatred.⁴¹ This greater strength is shown in the fact that resentment is normally followed by action, i.e. punishment.

This is a natural pattern of reaction, which is approved of as proper by any impartial spectator.⁴² Not only is it approved of; often the sympathetic feeling is so strong as to lead to action as well, in the form of assistance to the injured in his pursuit of punishment. Such an "active" sympathy would obviously never gain any approval and support in the case of hatred at the lack of beneficence. (ib. § 7)

This spectator-reaction is, of course, communicated by mutual sympathy to all members of a social group and everyone contemplating an act of injustice will thus know it and fear it:

"The person himself who meditates an injustice is sensible of this [kind of reaction], and feels that force may, with the utmost propriety, be made use of, both by the person he is about to injure, and by others, either to obstruct the execution of his crime, or to punish him when he has executed it." (ib. § 5)

Smith thus uses his idea of the moral primacy of the negative to draw a sharp distinction between all positive virtues, represented by beneficence, and justice:

"that remarkable distinction between justice and all the other social virtues ... that we feel ourselves to be under a stricter obligation to act according to justice, than agreeably to friendship, charity, or generosity; that the practice of these last-mentioned virtues seems to be left in some measure to our own choice, but that, somehow or other, we feel ourselves to be in a peculiar manner tied, bound, and obliged, to the observation of justice." (ib. § 5)

This distinction is also clearly seen if we turn our attention from the lack of the virtues to the reactions to the virtues themselves, for we will then see that beneficence naturally is rewarded with gratitude while justice is judged to be nothing but proper:

"There is, no doubt, a propriety in the practice of justice, and it merits, upon that account, all the approbation which is due to propriety. But as it does no real positive good, it is entitled to very little gratitude. Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. ... We may often fulfil all the rules of justice by sitting still and doing nothing." (ib. § 9)

This contrast between the negative virtue of justice and all the positive virtues is pursued even further by Smith. He always insists that the fundamental rules of justice are absolutely precise, whereas the rules of the positive virtues are rather unclear and uncertain:

"There is ... one virtue, of which the general rules determine, with the greatest exactness, every external action which it requires. This virtue is Justice. The rules of justice are accurate in the highest degree, and admit of no exceptions or modifications but such as may be ascertained as accurately as the rules themselves, and which generally, indeed, flow from the very same principles with them." (III, 6, § 10)

As far as the rules of all other virtues are concerned, we go by their "spirit", but with justice we follow the rules to the "letter":⁴³

"In the practice of the other virtues, our conduct should rather be directed by a certain idea of propriety, by a certain taste for a particular tenor of conduct, than by any regard to a precise maxim or rule; and we should consider the end and foundation of the rule more than the rule itself. But it is otherwise with regard to justice ... Though the end of the rules of justice be to hinder us from hurting our neighbour, it may frequently be a crime to violate them, though we could pretend, with some pretext of reason, that this particular violation could do no hurt ... When once we begin to give way to such refinements, there is no enormity so gross of which we may not be capable." (ib.)

This reasoning leads Smith to the following, rather nice comparison:

"The rules of justice may be compared to the rules of grammar;

the rules of the other virtues to the rules which critics lay down for the attainment of what is sublime and elegant in composition. The one are precise, accurate, and indispensable.

The other are loose, vague, and indeterminate ...".(ib. § 11)⁴⁴

Whence this great accuracy in the rules of justice? Smith never spells out his explanation, but in view of what we have already seen to be the foundation of justice the explanation seems rather obvious. The rules of justice are precise because they are derived from spectator-reactions which are unusually "universal" and "distinct", namely the "pungent" feeling of sympathetic resentment occasioned by "real and positive hurt". Smith's idea seems to be that clarity and accuracy is transferred in the following chain; the action (negative: hurting), the reaction (resentment & punishment), the spectator reaction through sympathy (sympathetic resentment & assistance in punishing), the general rule arising from spectator reactions.

The negative character of justice also implies that the general rules of this virtue arise somewhat differently from the rules of the other virtues. The latter arise from spectator-approval of the practice of those virtues, but the rules of justice arise from spectator-disapproval of injustice, of the non-performance of the virtue. If nobody had ever been unjust the rules of justice would never have been thought of, for they are but a specification of mere propriety.

Section 12. Utility and the Foundation of Justice

The stronger the sympathetic resentment of the impartial spectator is, the more important is the rule that arises from it. Hence the rule protecting life and personal safety is the most important rule of justice; next comes the rule protecting property; and thirdly rules protecting contracts:

"The most sacred laws of justice ... , those whose violation seems to call loudest for vengeance and punishment, are the laws which guard the life and person of our neighbour; the next are those which guard his property and possessions; and last of all come those which guard what are called his personal rights, or what is due to him from the promises of others."

(II, ii, 2, § 2)

One of the more remarkable differences between Smith's and Hume's theory of justice is that Smith in this way gives the rule about the protection of life a fundamental role, while Hume does not really treat it but gives his whole account in terms of property. The reason why Smith is able to do this is his theory of the primacy of the negative. The rules of justice are linked to the sympathetic spectator reactions to injury done and accordingly the rules vary with those reactions. It seems a true empirical observation that the reaction to personal injury, to attack on life, is significantly stronger than the reaction to attacks on possessions.

Occasionally Smith expresses this by distinguishing between natural rights and acquired rights. This would seem to be a clear echo of Hume's troublesome distinction between natural and artificial, but Smith does, significantly, not expand on this distinction itself: even

in the most primitive and "natural" stage of society man would have at least some acquired rights. Nevertheless, the distinction is of some importance because only the acquired rights can have a history.⁴⁵

Their content will change as man's situation changes.

The major difference between Hume and Smith is, however, to be found in their views of how justice is based upon men's natural moral judgment. This may, paradoxically, best be approached through their points of agreement. They agree that while all the positive virtues are an "extra" which make society flourishing and happy, (II, ii, 3, § 1) social life is quite possible without them, (ib. § 2) but there can be no society without justice:

"Beneficence ... is less essential to the existence of society than justice. Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it. ... [Beneficence] is the ornament which embellishes, not the foundation which supports the building, ... Justice, on the contrary, is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of human society ... must in a moment crumble into atoms." (ib. §§ 3-4)

This analogy inevitably recalls Hume's analogy in the *Enquiry* (p. 305) between benevolence and a wall and justice and a vault and it reminds us of how strongly Hume both in the *Enquiry* and in the *Treatise* stresses that justice in serving the public interest or utility, in the very special sense explained above in Chapter II, is the minimum condition for any kind of social life in the present world.⁴⁶

Equally for Smith, justice is the very minimum of a social framework, without which "no social intercourse can take place among men"; and, he points out, this extraordinary utility of justice has by some been taken as the very foundation for this virtue:

"the consideration of this necessity [of justice], it has been thought, was the ground upon which we approved of the enforcement of the laws of justice, by the punishment of those who violated them." (ib. § 6)

Smith then goes on to sketch this argument, and he formulates it so broadly that one can see both Grotius, Hume, and Hobbes alluded to:

"Man, it has been said, has a natural love for society, and desires that the union of mankind should be preserved for its own sake, and though he himself was to derive no benefit from it [Grotius]. The orderly and flourishing state of society is agreeable to him, and he takes delight in contemplating it. Its disorder and confusion, on the contrary, is the object of his aversion, and he is chagrined at whatever tends to produce it [Hume-like]. He is sensible, too, that his own interest is connected with the prosperity of society, and that the happiness, perhaps the preservation of his existence, depends upon its preservation [Hobbes and Hume, so far as a small society is concerned]." (Ib.)

This understanding of the utility of society leads to "an abhorrence at whatever can tend to destroy society". As "injustice necessarily tends to destroy it", "every appearance of injustice ... alarms" the individual "and he runs, if I may say so, to stop the progress of what, if allowed to go on, would quickly put an end to everything that is dear to him." (Ib.)

This account of the moral quality of justice in terms of its utility does, according to Smith, have certain virtues, for it explains the most important strengthening factor upon justice:

"so far this account is undoubtedly true, that we frequently have occasion to confirm our natural sense of the propriety and fitness of punishment, by reflecting how necessary it is for preserving the order of society." (ib. § 7)

This is e.g. relevant when people are to be punished for their crimes. Very often men will feel pity for the criminal about to suffer punishment and

"here therefore, they have occasion to call to their assistance the consideration of the general interest of society." (ib.)

It is the same case when the rules of justice are criticized. We will then very often point to their social necessity. (§ 8)

This is, nevertheless, not the correct explanation of justice, for such social utility is very rarely thought of by the bulk of mankind, although it is very obvious. Yet they by and large abide by the laws of justice:

"But though it commonly requires no great discernment to see the destructive tendency of all licentious practices to the welfare of society, it is seldom this consideration which first animates us against them. All men, even the most stupid and unthinking, abhor fraud, perfidy, and injustice, and delight to see them punished. But few men have reflected upon the necessity of justice to the existence of society, how obvious soever that necessity may appear to be." (ib. § 9)

In other words, justice is a prime example of how philosophers have made use of an excessive rationalism, in the form of utility considerations, to interpret human morality. Smith accordingly invokes his criticism of this, which is that such considerations are foreign to the bulk of mankind. Indeed, he uses this discussion of the utility of justice as the occasion for formulating his general theory of efficient versus final causes in moral science which we have already dealt with above.

As far as justice and social utility are concerned Smith also introduces a new and, as it seems to me, very valuable argument. He points out that it would be very odd if the application of justice were based upon a regard to the public, for the latter regard can only be made up of individual instances of regard to particular persons, since all moral judgment takes place through sympathy and sympathy can, of course, only be with concrete individuals. In human morality there is, therefore, a clear primacy of the individual over any kind of social wholes:

"The concern which we take in the fortune and happiness of individuals, does not, in common cases, arise from that which we take in the fortune and happiness of society. We are no more concerned for the destruction or loss of a single man, because this man is a member or part of society, and because we should be concerned for the destruction of society, than we are concerned for the loss of a single guinea, because this guinea is part of a thousand guineas, and because we should be concerned for the loss of the whole sum. In neither case does our regard for the individuals

arise from our regard for the multitude; but in both cases our regard for the multitude is compounded and made up of the particular regards which we feel for the different individuals of which it is composed." (II, ii, 3, § 10)⁴⁷

He then goes on to say that these "particular regards" do not presuppose any special, personal relationship as far as sympathy with resentment at injury is concerned. This is apparently so "pungent", "distinct", and "universal" that no more is necessary "than the general fellow-feeling which we have with every man, merely because he is our fellow-creature". (ib.)

The foundation of justice and of the rules of justice is, then, proper resentment and punishment, i.e. resentment and punishment which is approved of by the impartial spectator in individual instances. Once the rules exist on this foundation men may, however, occasionally support and defend them by reference to the useful result they in fact do produce, the maintenance of society.

In this connection there is a particularly interesting detail in Smith's argument. He points out that when our fundamental laws of justice and, in general, our "most sacred rules of morality" are met with vile criticism and opposition, we will very often defend them by referring to "their necessity to the support of society", though it is the "intrinsic hatefulness and detestableness" of such criticism "which originally inflames us against" it. This "reason, we think, would not appear to be conclusive"; and yet, Smith asks, "why should it not; if we hate and detest [such criticisms] because they are the natural and proper objects of hatred and detestation?" It is the answer he gives

to this that is interesting. When people can put forward such criticism, it shows that the natural value-community has broken down; they have lost their sense of propriety. Accordingly we try to refer to something else, which will normally be the utility of society:

"when we are asked why we should not act in such or such a manner, the very question seems to suppose that, to those who ask it, this manner of acting does not appear to be for its own sake the natural and proper object of those sentiments. We must shew them, therefore, that it ought to be so for the sake of something else. Upon this account we generally cast about for other arguments, and the consideration which first occurs to us, is the disorder and confusion of society which would result from the universal prevalence of such practices." (II, ii, 3, § 8).

The way Smith formulates this point, in terms of how "we cast about" and of what "first occurs to us" may give the reader the impression that it is of little importance and just an oddity mentioned in passing. This would, I think, be a mistake. I suggest that this case be seen as a prelude to the one following in § 11, the so-called sentinel case which has always been taken as an acknowledged counter-example to Smith's general theory of justice.

This is the case of the poor sentinel who falls asleep on his watch and is sentenced to death for endangering the whole army. In this and in similar cases,

"we both punish and approve of punishment, merely from a view to the general interest of society, which, we imagine, cannot otherwise be secured." (II, ii, 3, § 11)

The point of the case is, moreover, even stronger than that, for not only does the punishment take place from a consideration of utility; it is in actual conflict with our natural and spontaneous sense of propriety:

"this punishment, however necessary soever, always appears to be excessively severe. The natural atrocity of the crime seems to be so little, and the punishment so great, that it is with great difficulty that our heart can reconcile itself to it. Though such carelessness [as that of the sentinel] appears very blameable, yet the thought of this crime does not naturally excite any such resentment, as would prompt us to take such dreadful revenge." (ib.)

Now, from one point of view this is not so very curious. For all Smith is pointing out is that men in fact do deviate from the fundamental rules of justice, referring to considerations of utility. And his theory does, of course, allow for such deviations. People may simply not have understood, or not be very sensitive to, the natural propriety in the situation, or they may be perverted and immoral. But the curious thing is that he does not in any way indicate that this is the case here; he does not suggest that the practice of such punishments stands condemned by the laws of natural justice. On the contrary, the tone of his formulations seems to suggest that he endorses, or at least accepts, this practice in the fields of "civil police" and "military discipline".

On the face of it we have here Smith's acknowledgement of a rather enormous set of exceptions to his whole theory of justice and, on top of that, it seems to be a case of punishment of the innocent in the

name of utility, the focus for so much later criticism of utilitarianism.

Anyone would hesitate before reading a thinker of Smith's stature in this way, and yet it is by and large the received interpretation. There are few circumstantial excuses for Smith to be found. The case is not just mentioned in passing, but dealt with at some length. It is not an ill-considered idea fitted into the text during a revision; on the contrary, it has interested Smith from well before the first edition of the TMS.⁴⁸ Smith himself does not seem to have any regrets about the case; he deals with it in the same confident and straightforward way in which he presents his main ideas. I think rightly so, for the case is not all that puzzling.

Firstly, the sentinel is, of course, not innocent. He has clearly committed a wrong and the whole discussion is about the proportion between crime and punishment.⁴⁹ Secondly, it is of immense importance to notice that Smith explicitly limits this "utilitarian" justification of punishment to crimes within "civil police" and "military discipline", for both of these institutions exist solely as convenient means to protect a society in which men can live together according to the laws of justice. They are, therefore, to be judged in terms of their means-utility, or expediency towards this goal. The utility in terms of which we justify "civil police" and "military discipline", and hence also the breaches of them, is thus means-utility; and the end is clearly public utility, or interest, in Hume's sense, which, if it is a basically just society, means the maximum compatibility of all individual interests in the society. Any narrowly utilitarian interpretation

seems, therefore, to be a mistake, for there is never any reference to any particular content of the interests served, nor of the interests of any particular individuals.

We can see the case in § 8, which we dealt with above, as an introduction to the sentinel case. Just as public utility there was presented as a possible recourse in moral arguments when the communal sense of propriety is missing, so utility in the present case provides a recourse when the spontaneous sense of propriety is likely to be confused.

Finally, the most difficult point in the sentinel case is the seeming conflict between the sense of propriety and the judgment in terms of public utility. This conflict is, however, only seeming, for surely Smith's point is that the immediate sense of propriety is corrected once it becomes more enlightened, i.e. once the possible consequences of the sentinel's behaviour becomes part of the background knowledge of those judging. Such knowledge is only rarely taken into regard by men when they judge morally, but it is quite possible for them to do so in areas like "civil police" and "military discipline" which are themselves institutions that are only maintained on the background of such knowledge.

It seems quite clear to me that the sentinel case, viewed in this way, is in complete accord with Smith's general explanation of the influence of utility on moral evaluation, as a rare, but quite possible, afterthought to ordinary judgments in terms of situational propriety. What it shows is an extreme case of the influence of such afterthoughts.

This is as near as Smith comes to treating justice in the same way as

Hume did the artificial virtues in general, and justice in particular; and accompanying it we have the same ideas of public interest, and approaches to the distinction between means- and end-utility.

The importance of this case must not lead us to neglect and confuse the topic of the final Section of Part II where Smith considers the influence of fortune on judgments of merit and demerit. The point of this Section is the limited one of tracing one particularly important source of distortion of men's sense of propriety, namely what he calls fortune.

The only acknowledged object of moral judgment is human motivation; but in fact the actual action and its consequences intrude themselves and can often more or less steal the picture. (II, iii, Introduction)

"And, as the consequences of actions are altogether under the empire of fortune, hence arises her influence upon the sentiments of mankind with regard to merit and demerit."

(II, iii, 1, § 7)

This distortion can happen because the pleasure/pain which is created by the actual consequences of an action is spontaneously referred backwards to the motive or intention behind the action in the form of gratitude/resentment. This happens to some extent even when the consequences cannot possibly have been intended; and although it is corrected in the more extreme cases, like resentment at, and punishment of, a stone we stumble over, it will always remain a feature in our judgment of our fellow-men. Here both intentions and actual consequences do in fact function as exciting causes of our judgment and if either of them is missing, the judgment is affected accordingly. (ib.,

ch. 1) Smith summarises this effect thus:

"The effect of this influence of fortune, is, first, to diminish our sense of the merit or demerit of those actions which arose from the most laudable or blameable intentions, when they fail of producing their proposed effects: and, secondly, to increase our sense of the merit or demerit of actions, beyond what is due to the motives or affections from which they proceed, when they accidentally give occasion either to extraordinary pleasure or pain." (II, iii, 2, § 1)

This twist to all judgments in terms of propriety is, naturally, communicated by means of mutual sympathy throughout any social group.

Hence it is that although the ideal objects of our moral judgments are motives and intentions, the actual objects are most often actions and their consequences.⁵⁰ This is a most extraordinary combination of an ethics of intentions with an ethics of consequences. Moreover, it serves Smith to good explanatory purpose, for it is precisely this combination which enables him to interpret morality as a guide to external action in a world of fortune and yet at the same time to see this morality as ultimately concerned with ideal and absolute propriety. As to the first point:

"If the hurtfulness of the design, if the malevolence of the affection, were alone the causes which excited our resentment, we should feel all the furies of that passion against any person in whose breast we suspected or believed such designs or affections were harboured, though they had never broken out into any actions. Sentiments, thoughts, intentions, would become the objects of punishment; and if the indignation of mankind

run as high against them as against actions ... , every court of judicature would become a real inquisition. ... Actions, therefore, which either produce actual evil, or attempt to produce it, ... are by the Author of nature rendered the only proper and approved objects of human punishment and resentment. Sentiments, designs, affections, though it is from these that according to cool reason human actions derive their whole merit or demerit, are placed by the great Judge of hearts beyond the limits of every human jurisdiction, ... That necessary rule of justice, therefore, that men in this life are liable to punishment for their actions only, not for their designs and intentions, is founded upon this salutary and useful irregularity in human sentiments concerning merit or demerit, which at first sight appears so absurd and unaccountable." (II, iii, 3, § 2) ⁵¹

But this *forum externum* in no way excludes a *forum internum* where the spectator tries to rid himself of all distortion in the search for a judgment based upon a standard of absolute propriety, the standard of the impartial spectator:

"Notwithstanding ... all these seeming irregularities of sentiment, if man should unfortunately either give occasion to those evils which he did not intend, or fail in producing that good which he intended, Nature has not left his innocence altogether without consolation, nor his virtue altogether without reward. He then calls to his assistance that just and equitable maxim, that those events which did not depend upon our conduct, ought not to diminish the esteem that is due to

us. He summons up his whole magnanimity and firmness of soul, and strives to regard himself, not in the light in which he at present appears, but in that which he ought to appear, in which he would have appeared had his generous designs been crowned with success, and in which he would still appear, notwithstanding their miscarriage, if the sentiments of mankind were either altogether candid and equitable, or even perfectly consistent with themselves."⁵² (ib. § 6)

Section 13. Science of Morals?

The greatness of Smith's theory is that it in this way is a theory of social morality in any given society and at the same time a theory of universal and ideal morality. The great simplicity in the theory, once one has caught sight of it, is that it uses the same explanatory principle for both, viz. selection through mutual sympathy. As we have seen, it is mutual sympathy between actual spectators, patients, and agents that establishes a social morality, but at the same time it inevitably establishes the search for the ideal spectator and his moral standards.

In spite of the importance of the impartial spectator it, nevertheless, remains a fact that Smith's whole discourse is kept in descriptive terms. We seem all the time to be told what people in fact consider morally right, rather than what *is* morally right. This has led one commentator to the conclusion that,

"it is possible to interpret Adam Smith as making no ethical statements at all, that is, solely as a moral psychologist

engaged in analysing and explaining acts of approval and disapproval."⁵³

And another commentator agrees that,

"this is the correct interpretation of the *Moral Sentiments* (provided that the term 'psychologist' is not taken to exclude a sociological approach)."⁵⁴

According to this view of Smith as the scientist of morals it was never part of Smith's intentions to be the moralist who tells men what is right and wrong. In so far as he brings in his own evaluations at all it is on a contemplative level where he, with the few philosophers, statesmen, and scientists, who are able to, tries to take a God's-eye-view of mankind in its moral aspect, i.e. in society. From this elevated vantage point he will judge everything in terms of its utility, admiring how God has brought about a universal order which secures the basic happiness of man. On weekdays this order provides the scientist with his explanatory tasks, on Sundays it stands as the object of the contemplative utilitarian's admiration. Whenever the latter perceives that the order leaves something to be desired in order to promote the happiness of man, the former will be in a position to provide the statesman with the knowledge necessary to rectify it.⁵⁵

"Utility is, therefore, very much *the* meta-principle for Smith." "It is the principle which provides many final explanations, and which enables us to make ultimate assessments concerning the soundness of ordinary moral judgments and the value of the whole mechanism of society; it is also the principle according to which political reforms ought to be conducted, and on which the citizen ought to base his decisions about political obligation, when this is in doubt."⁵⁶

This is a coherent and very strong interpretation of Smith's basic position. In a sense I can agree with it but, on the other hand, it does seem to miss some of the subtlety and, particularly, the normative bite of Smith's theory. As I argued in Section 5 above, when we first stopped to consider this basic problem, the impartial spectator provides the criteria which mankind must use in deciding whether an action or character is morally valuable or not. This argument seems to me to be best characterized by a term from a different philosophical tradition. It is a kind of transcendental argument, for it spells out the principles which implicitly are the necessary conditions for moral judgments and the existence and function of moral judgments are matters of empirical fact. The principles are, as we know, in essence that the judgment be undertaken from an impartial standpoint, the standpoint of "anyone", i.e. in accordance with a general rule; and that it fits the situation, i.e. that it is compatible with whatever moral values are accepted as "valid-for-the-time-being", the moral background knowledge, which always has to be taken for granted at any given time.

If we read Smith in this way his science of morals does take on quite some normative significance. Although it does not provide us with final proofs of what is morally right and wrong, it does show us how moral judgments can be objectively discussed or tested. Those moral judgments which do not comply with the principles embodied in the impartial spectator can, at least tentatively, be discarded. Smith's theory is certainly not a set of basic moral doctrines, nor a prescription for how to build up such a set. On the contrary, it presupposes

the existence of a moral life; but it specifies the principles according to which any discussion within the moral life must take place.

In such discussion our search for the standpoint of the impartial spectator may, of course, be enlightened by considerations of utility, in the sense mentioned above. We should, however, not forget that for Smith such considerations are correcting afterthoughts to the spectator's judgment in terms of situational propriety. Neither should we forget that the utility in question is "public interest", and not any utilitarian happiness calculation as far as action is concerned. Whereas the order admired by the contemplative utilitarian is nothing but a speculative completion of whatever partial order we find in the world.

Section 14. Natural Justice and Positive Law

If we with these reflections in our mind return to Smith's theory of justice and ask some twentieth century questions we are in for some eighteenth century surprises. If we in the context of Smith's theory of justice formulate the problem just discussed, we must ask whether this is a normative theory of law, possibly a kind of "natural law" doctrine, whether it is a social psychology of law, and even whether it is the framework for a history of law. If we face these questions with the usual alternative of Smith as either the traditional fundamentalist moralist or as the scientist of morals, then we are in genuine difficulties, for Smith's theory seems to be all of the three things mentioned. It does, however, make very good sense to say this if we accept something like the interpretation outlined above according to

which the normative function of a predominantly descriptive doctrine is restricted to a critical one.

That Smith's theory is a social psychology of law hardly needs further argument. That it provides the framework for a history of law will be outlined below. That it has a critical, normative function seems evident from what we have already seen of it as a theory of natural justice. Natural justice is that justice which is approved of as proper by the impartial spectator. Which is to say, it is those rules of behaviour which stand out from all cases where resentment at, and punishment of, injury done is absolutely proper. This is completely parallel with all the other virtues, except for the important circumstance that because justice is a negative virtue, which is solely concerned with the ruling out of the negative in human life (pain and misery) and because the negative is perceived as more "pungent", "distinct", and "universal", the rules of justice are the only moral rules which can be clear and precise and determined with certainty. This difference between positive and negative is the whole point in the strong contrast drawn between natural jurisprudence and casuistry,⁵⁷ casuistry being a discipline which,

"attempted, to no purpose, to direct, by precise rules, what it belongs to feeling and sentiment only to judge of"; for "what holds good in any one case would scarce do so exactly in any other, and what constitutes the propriety and happiness of behaviour varies in every case with the smallest variety of situation." (VII, iv, § 33)⁵⁸

But as the primacy of the negative "holds good" in every case, we can see why "justice is the only virtue with regard to which ... exact rules

can properly be given." (ib. § 7)

This idea of a set of rules of justice which function as a fundamental, "natural law" naturally brings Smith to a criticism of legal positivism and, like Hume, he chooses Hobbes as the target for this criticism. According to legal positivism social life and civil society are identical, (VII, iii, 2, § 1) and there cannot be any moral standards independent of the direction of the civil power. According to Hobbes,

"The very ideas of laudable and blameable, ought to be the same with those of obedience and disobedience. The laws of the civil magistrate, therefore, ought to be regarded as the sole ultimate standards of what was just and unjust, of what was right and wrong." (ib.)

To refute this, Smith joins forces with Cudworth in the first instance:

"In order to confute so odious a doctrine, it was necessary to prove that, antecedent to all law or positive institution, the mind was naturally endowed with a faculty, by which it distinguished, in certain actions and affections, the qualities of right, laudable, and virtuous, and in others those of wrong, blameable, and vicious. - Law, it was justly observed by Dr. Cudworth, could not be the original source of those distinctions, since, upon the supposition of such a law, it must either be right to obey it, and wrong to disobey it, or indifferent whether we obeyed it or disobeyed it. That law which it was indifferent whether we obeyed or disobeyed, could not, it was evident, be the source of those distinctions; neither could that which it was right to obey and wrong to disobey, since even this still supposed the antecedent notions or ideas of right

and wrong, and that obedience to the law was conformable to

the idea of right, and disobedience to that of wrong." (ib. §§ 3-4)

Although Smith can take over this fundamental criticism of legal positivism from Cudworth he, of course, has to part with him concerning the question of *how* men can have those ideas of what is naturally right or wrong independent of civil society. For Cudworth this was possible by means of universal human reason,

"and this conclusion ... was more easily received at a time when the abstract science of human nature was but in its infancy, and before the distinct offices and powers of the different faculties of the human mind had been carefully examined and distinguished from one another." (ib. § 5)⁵⁹

Smith, however, has had the benefit of this development of the "abstract science of human nature", consequently he has been able to do better than Cudworth with his theory of the moral sentiments, of their communication through mutual sympathy, and of their formation of the ideal morality of the impartial spectator.

There is, then, a natural justice independent of civil society, for

"Among equals each individual is naturally, and antecedent to the institution of civil government, regarded as having a right both to defend himself from injuries, and to exact a certain degree of punishment for those which have been done to him."

(II, ii, 1, § 7)

This gives a clear meaning to the old idea of rights: Our rights are those areas of life which we can defend through punishment which is approved of by the impartial spectator.

This "natural law" is not only independent of civil society and its positive law. It constitutes the ideal foundation for positive law, the very principles upon which positive law ought to be formed, and that is the reason why natural jurisprudence is such an important discipline:

"The wisdom of every state or commonwealth endeavours, as well as it can, to employ the force of the society to restrain those who are subject to its authority from hurting or disturbing the happiness of one another. The rules which it establishes for this purpose constitute the civil and criminal law of each particular state or country. The principles upon which those rules either are or ought to be founded, are the subject of a particular science, of all sciences by far the most important, but hitherto, perhaps, the least cultivated - that of natural jurisprudence." (VI, ii, Introduction, § 2)⁶⁰

Natural justice is, therefore, an ideal standard which is to be searched for, not only in the case of individual actions, but also in the total legal code of any given civil society:

"Every system of positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence, or towards an enumeration of the particular rules of justice."
(VII, iv, § 36)

Such a system "of what might properly be called natural jurisprudence" would be truly universal for it would be

"a theory of the general principles which ought to run through, and be the foundation of, the laws of all nations." (ib. § 37)⁶¹

This universality is, of course, one of the principles embodied in the

impartial spectator, and it reigns supreme in the virtue of justice because of its negative, and hence precise, character.

An obvious implication is that such a system of natural law would be a weapon for criticism of positive law which falls *too* short of its standards, for

"In no country do the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice would dictate. Systems of positive law, therefore, though they deserve the greatest authority, as the records of the sentiments of mankind in different ages and nations, yet can never be regarded as accurate systems of the rules of natural justice." (ib. § 36)

In view of all this it seems somewhat difficult to understand Professor Campbell's remark that,

"When ... [Smith] contrasts laws that are in accordance with nature with those that depart from this 'norm' he simply means that the latter do not accord with the consensus of moral opinions in that type of society."⁶²

Whole systems of law deviate from natural justice, and there is no reason to think that even "the consensus of moral opinion" should not be capable of doing so on occasion. To identify natural justice with the consensus is to overlook, not only Smith's outline of a new doctrine of "natural law", as quoted above, but also most of what he has had to say about the ideal, impartial spectator. Although the *origin* of a man's understanding of the spectator's standpoint is the "consensus" this does not affect its validity.

Smith points out that,

"it was very late in the world before any such general system was thought of, or before the philosophy of law was treated of by itself, and without regard to the particular institutions of any one nation." (ib. § 37)

He maintains that the attempts which have been made are all rather incomplete and imperfect, the best of these, that of Grotius, included.

(ib.)⁶³ This is, of course, in spite of the fact that the moral reasoning of men with regard to justice has at all times in the history of man had an implicit, and in individual cases maybe explicit, reference to natural justice. It is the standard they fall short of and the ideal they in particular cases aspire to. Natural justice has thus in a sense been with men since the beginning of time and been developed through men's reactions in particular contexts. But exactly because the laws of natural justice are rules which stand out unintentionally from such reactions in particular situations, the formulation of the laws and their organization into a system will always trail behind. The formation of such a system is a philosopher's task and Smith thought of himself as such a philosopher:

"I shall, in another discourse, endeavour to give an account of the general principles of law and government ...". (ib.)

It is, however, not a philosopher's *construction* for it is completely dependent upon the general principles contained in the standpoint of the impartial spectator.

Section 15. The History of Law and Society

One of the most unusual features of Smith's plan for a discourse on law is that it should not only deal with "the general principles of law and government" but also with "the different revolutions they have undergone in the different ages and periods of society". (TMS, VII, iv, § 37) It should deal not only with the universal standards of the impartial spectator but also with the history of all the actual approaches to these standards, with how natural justice has fared in the hands of positive law and particular institutions in different countries and ages.

Smith never came to write, or at least publish, this discourse. But in the *Wealth of Nations* and in the student's lecture notes which have been preserved⁶⁴ there are sufficient indications of his view of history to let the world dispute and too little to make it agree. However, if the interpretation of Smith's theory of natural justice outlined above is accepted, then it does seem that the function of history within the framework of Smith's general argument becomes quite intelligible. If the universal principles of justice are nothing but "negative" tests for injustice within a given, pre-existing moral code, then obviously the history of this code becomes of the greatest importance. This again shows that the history of morals in general, and of law in particular, is part of the general science of morals and that it shares in the indirect normative significance of the latter, as explained in Section 13 above. It is important to notice that this is the only way in which the history of law has such significance. As was the case with Hume, Smith never allows the mere antiquity of law to lend it any absolute validity.

Although the *function* of history in Smith's theory of law seems clear, it may not be so clear what view he took of the *content* of this history and this has been the main source of argument in Smith-scholarship during the past forty years.⁶⁵ It would be stretching the framework of the present work to go into Smith's historical views in any detail but since the most generally accepted interpretation by implication affects the view of justice presented here, it will be necessary first to give a brief summary of Smith's history of law and society and then discuss the significance of this for his theory of law.

Smith deals with law as part of the general history of society which he divides into four broad stages:

"The four stages of society are hunting, pasturage, farming and commerce." (*Justice*, p. 107)

In all stages of society the state of the law is dependent upon the injuries which one man can inflict upon another since, as we know, justice is a merely negative virtue, protecting against injustice, i.e. injury. In any stage of society man can be injured in his person and there will, therefore, always be a minimum of natural justice regulating the affairs of men. Since, however,

"Envy, malice, or resentment, are the only passions which can prompt one man to injure another in his person or reputation" (W.o.N., V, i, b. 2)

and since

"the greater part of men are not very frequently under the influence of those passions; and the very worst men are so only occasionally" (W.o.N. ib.)

it follows that no substantial system of law will be established as

long as men can not injure one another in other ways. Accordingly the authorities which would dispense justice will not develop and the society will live in a state of primitive equality. This is the condition under which men live in the earliest and "the lowest and rudest state of society" (W.o.N., V. i. a 2.):

"Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour; so there is seldom any established magistrate or any regular administration of justice." (W.o.N., V. i. b. 2)⁶⁶

It is an extension of property which leads to an extension of the idea of injury and thus of justice.⁶⁷ On the institutional level the development of property creates a need for its protection, i.e. for social authorities which can administer justice.

The extension of property occurs when men start to domesticate animals instead of killing them.⁶⁸ This is a dramatic change in society in general and in law in particular for it leads not only to the need for an authority to administer justice, it also creates such an authority. In the society of hunters the only principles of stratification are the "personal qualifications, of strength, beauty, and agility of body; of wisdom, and virtue, or prudence, justice, fortitude, and moderation of mind", and "the superiority of age", neither of which are able to create durable forms of authority. (W.o.N., V. i. b. 3ff; *Justice*, pp, 14-15) But the appropriation of herds leads to great inequalities of fortune and to the dependence of the poor upon the rich, since the latter have no other way of using their riches. In this way not only dependence but also institutionalized authority grows up:

"A Tartar chief, the increase of whose herds and flocks is sufficient to maintain a thousand men, cannot well employ that increase in any other way than in maintaining a thousand men. ... The thousand men whom he thus maintains, depending entirely upon him for their subsistence, must obey his orders in war and submit to his jurisdiction in peace. He is necessarily both their general, and their judge, and his chieftainship is the necessary effect of the superiority of his fortune." (W.o.N., V. i. b. 7)

The conclusion is clear:

"Till there be property there can be no government, the very end of which is to secure wealth, and to defend the rich from the poor." (*Justice*, p. 15)⁶⁹

The extension of property to more durable riches also makes it possible that the fortune and hence the authority will remain with one family over generations.⁷⁰ As far as the law is concerned this starts the development of inheritance laws which, however, will only receive their full unfolding with the further extension of property to land.

As long as people are living as nomads no one will think of land as something which anyone could have a separate property right to, but when the cultivation of small plots of land spreads the idea of property in land arises, first as communal, afterwards as private property. Clearly, then,

"property receives its greatest extension from agriculture".

(*Justice*, p. 109)

Agriculture brings the possibility of surplus production over the needs

of the society and trade thus becomes a possibility. At the same time, however, a problem of defence arises in so far as the neighbouring societies which may not have reached the same level of development will be tempted by the riches of the settled, agricultural community. A solution to this problem is to be found in the formation of cities,⁷¹ and cities will, as Smith explains in Book 3 of the *Wealth of Nations*, at this stage already be developing for another reason:

"Without the assistance of some artificers ... the cultivation of land cannot be carried on, but with great inconveniency and continual interruption. ... Such artificers too stand, occasionally, in need of the assistance of one another; and as their residence is not, like that of the farmer, necessarily tied down to a precise spot, they naturally settle in the neighbourhood of one another, and thus form a small town or village." (W.o.N., III. i. 4)

Once such towns are settled they can be fortified and thus provide a solution to the problem of defence. At the same time they are also necessary for the emerging trade, first as the local market, later as export centres.

At this point Smith's account becomes rather complicated and a number of differences between developments in ancient Greece and Rome and in Europe after the fall of the Roman Empire are introduced. We need not go into these but must notice that as far as the law is concerned the two developments of the very greatest importance during the agricultural stage of society are the following. Firstly, the extension of property to land leads to the full articulation of inheritance laws. This again had to do with defence and security. In continuation of the status of

the nomadic chief in the earlier age,

"every great landlord was a sort of petty prince. His tenants were his subjects. He was their judge, and in some respects their legislator in peace, and their leader in war." (W.o.N., III. ii. 3)

Consequently everyone's security depended upon the continued strength of the landlord which again depended upon the land he commanded,

"The security of a landed estate ..., the protection which its owner could afford to those who dwelt on it, depended upon its greatness." (W.o.N., ib.)

It was, therefore, necessary to keep the estate together as a unity,

"To divide it was to ruin it, and to expose every part of it to be oppressed and swallowed up by the incursions of its neighbours." (W.o.N., ib.)

Under these circumstances the law of primogeniture would slowly begin to develop and equally entail would be introduced. This securing of the big estates made many of the landlords mighty enough to match even the king, thus perpetuating the insecurity and violence of the times.

It was, at least partly, in an attempt to counteract this threat to their power that kings granted the cities a larger and larger measure of autonomy, through various tax laws and through royal charters of self-government.⁷² This gave a boost to the cities which made possible the second great development of law in this stage of society. The cities could maintain their independence of the landlords and, in time, even of the kings provided the burghers acted together. At the same time the city economy could only function if it was regulated by

general rules. These two needs together turned the cities into "a sort of independent republics"⁷³ governed by rules which secured the freedom of the individual. This contrasted markedly with the conditions on the land:

"Order and good government, and along with them the liberty and security of individuals, were ... established in cities at a time when the occupiers of land in the country were exposed to every sort of violence. But men in this defenceless state naturally content themselves with their necessary subsistence; because to acquire more might only tempt the injustice of their oppressors. On the contrary, when they are secure of enjoying the fruits of their industry, they naturally exert it to better their condition, and to acquire not only the necessities, but the conveniencies and elegancies of life. That industry, therefore, which aims at something more than necessary subsistence, was established in cities long before it was commonly practised by the occupiers of land in the country." (W.o.N., III, iii, 12)

This contrast between town and country did, however, not last. The trade and manufacture of the cities provided a new outlet for the wealth of the landlords. Whereas they hitherto had had nothing to spend their surplus on but the maintenance of dependents they could now suddenly exchange it for manufactured and imported goods. This broke the traditional powers of the landlords for, in Mr. Skinner's excellent summary, it led to

"the dissipation of their fortunes, the dismissal of their retainers, and the substitution of a cash for the service

relationships which had previously existed between the owner of land and those who cultivated it."⁷⁴

Once the feudal powers of the landlords were broken the general rules of justice could grow over the city walls and become country wide:

"The tenants having ... become independent, and the retainers being dismissed, the great proprietors were no longer capable of interrupting the regular execution of justice, or of disturbing the peace of the country. Having sold their birth-right ... they became as insignificant as any substantial burgher or tradesman in a city. A regular government was established in the country as well as in the city, nobody having sufficient power to disturb its operations in the one, more than in the other." (W.o.N., III. iv. 15)⁷⁵

Once this has happened we have entered the fourth stage of society, the commercial, for this is characterized by a regular administration of justice more than by anything else. The mode of subsistence presupposes the maintenance of law:

"Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay." (W.o.N., V. iii. 7)

Such is in outline Smith's view of the history of society in general

and of law in particular. Many elements in Smith's account have had to be left out here. I have thus not considered how he adapts the general scheme of development to particular cases such as ancient Greece and Rome and especially modern Europe after the fall of Rome where a number of complications occur. I have also deliberately avoided the complex details of the development of feudal law, which may even be regarded as an anomaly in the "natural" development.⁷⁶ Similarly I have neglected many of Smith's qualifications and exceptions, such as the fact that

"Some North American nations cultivate a little piece of ground, though they have no notion of keeping flocks."

(*Justice*, p. 108)

The outline presented above should, however, be sufficient to make intelligible the following discussion of the nature of Smith's view of history and its relevance for his theory of natural justice.⁷⁷

Section 16. The Scope for Natural Justice

For many years the most commonly accepted view has been that Smith

"founds ... a new interpretation of society which is undoubtedly materialistic"⁷⁸

and that his idea of the development of society in four stages was

"a, if not *the*, materialist conception of history".⁷⁹

Professor Meek in one of his articles formulates this interpretation of Smith in six theses as follows:

1. "Everything in society and in history was bound together by a succession of causes and effects."

2. "Society developed blindly, but not arbitrarily."
3. "In the process of development the key factor was the 'mode of subsistence'."
4. "In tracing out the process of development, particular emphasis should be placed on the reciprocal interconnection between property and government."
5. "Emphasis should also be placed on the emergence and growth of a social surplus, upon which depended the rise of towns, the arts, manufactures, new social classes, etc."
6. To each of the four stages of society "there corresponded different ideas and institutions relating to property; to each there corresponded different ideas and institutions relating to government; and in relation to each, general statements could be made about the state of manners and morals, the social surplus, the legal system, the division of labor, etc."⁸⁰

Or, as Professor Meek puts it more bluntly elsewhere,

"Throughout all these successive stages [of society] ... the way in which people get their living is conceived to determine the main lines along which they think and behave."⁸¹

This is obviously an extremely forceful interpretation of Smith and, furthermore, one which, at least intuitively, is inconsistent with the reading of Smith offered above, according to which he considered natural justice as an active force in the life of mankind. A discussion of this point is, however, hampered by the vagueness of the economic, or materialist, view of Smith's history. Apart from the last quoted passage where the relationship between economic factors and social

phenomena is said to be one of determination, this central relation is normally described in rather unspecific terms, such as "reciprocal interconnection", dependence, and correspondence.

This non-committal caution is, further, illustrated in the most careful, scholarly, and sophisticated version of this line of interpretation which is presented by Mr. Skinner. He is very well aware that the arguments of the Scottish Historical School now and then are in danger of lapsing into "vulgar marxism". He warns us, however, that

"Smith did not commit any such 'error' and would appear to come close to Engels's general position in arguing that the economic finally asserts itself as the 'ultimate', rather than as the sole, determining factor."⁸²

It would seem to me that the basic question to be asked here is whether the ultimacy of "the economic" means that all social phenomena which are not economic can be explained as ultimately determined by economic factors; or whether it means that economic factors are always amongst the determinants of all social phenomena and hence ultimately have to be referred to in social explanations. My line of argument in the following will be that the former view is untenable as an interpretation of Smith and that the latter, while true of Smith, can only very misleadingly be described as an economic, or materialist, view of society and history.

We can take it as a starting point upon which everyone agrees that according to Smith economic factors can only be socially determining through their influence on individuals. One supra individual social phenomenon does not bring about another without the intervening activity

of human individuals. This does, of course, not mean that individuals consciously and intentionally work to bring this about. On the contrary, society in general and morality and law in particular, as we have seen above, are the unintended results of individual human actions. Professor Meek is, therefore, quite right that for Smith, "Society developed blindly".

In this sense Smith is a methodological individualist but, as we know from our detailed discussions of *The Theory of Moral Sentiments* above, this does not preclude that the explanation of individuals, their motivation, and their behaviour is conducted with reference to a social framework. What is excluded in Smith's methodology is ultimate explanation in terms of social "wholes" alone and explanation in terms of individuals alone. This is, of course, tantamount to saying that ultimate explanations as such are excluded, but that is a point which cannot be pursued here.

With this point agreed upon it becomes clear that the whole discussion of Smith's alleged "materialism" must be conducted in terms of human motivation. It would seem that "materialism" here can mean two things. Either it can mean that the motives behind the behaviour which shapes society and its development ultimately must be "economic" or "materialist". Or it can mean that only the "economic" or "material" factors in the situation of the individuals are determining for their motivation and hence for their behaviour when they act in ways which are decisive for the form and development of society. In both senses I think that it is a mistake to call Smith's view of society and history "economic" or "materialist".

Smith's ideas of basic human motivation seem far from "materialist". It is not the procurement of the basic necessities for subsistence which motivates men to create an existence which is distinctively human. The necessities are in general provided for him by nature:

"nature produces for every animal everything that is sufficient to support it without having recourse to the improvement of the original production. Food, clothes and lodging are all the wants of any animal whatever, and most of the animal creation are sufficiently provided for by nature in all those wants to which their condition is liable." (*Justice*, pp. 157-58)

What distinguishes man above the rest of the animal creation is rather a certain "delicacy", or taste, as far as both body and mind are concerned:

"Such is the delicacy of man alone, that no object is produced to his liking. He finds that in everything there is need of improvement." Accordingly the "whole industry of human life is employed not in procuring the supply of our three humble necessities, food, clothes and lodging, but in procuring the conveniencies of it according to the nicety and delicacy of our taste." (*ib.*, pp. 158 and 160)

Just as man is motivated to rise above the other animals, not by material need, but by delicacy and taste, so he tries to rise above his fellow men for reasons quite other than those concerned with his subsistence. As far as subsistence is concerned all men are roughly equal:

"The rich ... consume little more than the poor", for the "desire of food is limited in every man by the narrow capacity of the human stomach". (TMS, IV, 1, § 10, and W.o.N., I, xi, c, 7)

Much the same applies to all the necessities of nature,

"The wages of the meanest labourer can supply them. We see that they afford him food and clothing, the comfort of a house, and of a family." (TMS, I, iii, 2, §1)

Therefore,

"In ease of body and peace of mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for." (TMS, IV, 1, § 11)

It is not economic needs which motivate men to make the world go around. It is rather an aestheticized version of the taste and delicacy which raised men above the rest of the animal creation:

"The pleasures of wealth and greatness ... strike the imagination as something grand and beautiful and noble, of which the attainment is well worth all the toil and anxiety which we are so apt to bestow upon it. - And it is well that nature imposes upon us in this manner. It is this deception which rouses and keeps in continual motion the industry of mankind." (TMS, IV, 1, §§ 9-10)⁸³

Combined with this aesthetic motivation is *vanity*, the real or imagined pressure of the gaze of society upon us which is received and internalized through sympathy.⁸⁴ The resulting race of man's social life inspires Smith to some of his most eloquent, witty, and ironic observations:

"from whence, then, arises that emulation which runs through all the different ranks of men, and what are the advantages which we propose by that great purpose of human life which we

call bettering our condition? To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages which we can propose to derive from it. It is the vanity, not the ease, or the pleasure, which interests us." (I, iii, 2, § 1)

And hence it is that, "place, that great object which divides the wives of aldermen, is the end of half the labours of human life"! (ib. § 8)⁸⁵

It is, therefore, not at all economic motives, but rather taste and vanity which constitutes the "invisible hand" (TMS, IV, 1, § 10) that leads and directs all the individual human lives into a more or less orderly social process:

"It is this which first prompted [men] to cultivate the ground, to build houses, to found cities and commonwealths, and to invent and improve all the sciences and arts, which enoble and embellish human life; which have entirely changed the whole face of the globe, have turned the rude forests of nature into agreeable and fertile plains, and made the trackless and barren ocean a new fund of subsistence, and the great high road of communication to the different nations of the earth." (TMS, IV, 1, § 10)

It should be remarked that Smith in fact does use those general ideas when he comes to write history. It is thus exactly taste and vanity which are behind the important dissolution of the large feudal estates and therefore behind one of the decisive developments towards modern, commercial society. For once the big landowners had

"sold their birth-right, not like Esau for a mess of pottage in time of hunger and necessity, but in the wantonness of plenty,

for trinkets and baubles, fitter to be the play-things of children than the serious pursuits of men, they became as insignificant as any substantial burgher or tradesman in a city." (W.o.N., III, iv, 15)⁸⁶

Maybe the most spectacular demonstration that it is not economic motives which in general give form to a society is Smith's insistence that it is only rarely in the history of mankind that such motivation is the basis for political power and, in general, social authority. It is true that in the nomadic stage of society the bulk of the population is directly dependent upon the wealth of the chiefs. But beyond that stage it is not the economic motives of the dependents which create political power and authority,

"for in general the poor are independent, and support themselves by their labour, yet, though they expect no benefit from [the rich], they have a strong propensity to pay them respect."
(*Justice*, p. 9)

The explanation of this remarkable phenomenon is men's aestheticizing participation in the lives of the rich through sympathy, whereas hopes of personal gain play little or no role:

"Upon this disposition of mankind, to go along with all the passions of the rich and the powerful, is founded the distinction of ranks, and the order of society. Our obsequiousness to our superiors more frequently arises from our admiration for the advantages of their situation, than from any private expectations of benefit from their good-will. Their benefits can extend but to a few; but their fortunes interest almost every body. We are eager to assist them in completing a system

of happiness that approaches so near to perfection; and we desire to serve them for their own sake, without any recompense but the vanity or the honour of obliging them.

Neither is our deference to their inclinations founded chiefly, or altogether, upon a regard to the utility of such submission, and to the order of society, which is best supported by it." (TMS, I, iii, 2, § 3)

In saying that the human motivation behind social change is taste and vanity, Smith is obviously not saying anything about the specific content of human motives, but rather about the principles in accordance with which they are formed. The specific content is filled in according to the situation in which man finds himself and since men through the ages are to be found in a multiplicity of situations they will be acting on a plurality of motives, as we will see below. This point is, however, also important in relation to a proposal about how Smith, after all, could be seen to find one specific motive behind all human activity which, although it is not in itself "economic", is more easily turned into "economic motivation" proper than are motives formed in accordance with the principles of taste and vanity. I am thinking of Mr. Skinner's suggestion that man, according to Smith

"is self-regarding in all spheres of activity ... thus explaining his pursuit of security, wealth, and that form of satisfaction on which the development of productive forces may be seen to depend."⁸⁷

or, in other words,

"that man is motivated by a desire to seek pleasure and to avoid pain".⁸⁸

It should, however, be clear that this attempt to unify all human motivation does not work as long as a multiplicity of things can create pleasure and pain: it is simply vacuous for explanatory purposes.⁸⁹ And quite apart from that, Smith is rather emphatic that in connection with

"that great purpose of human life which we call bettering our condition ... [i]t is the vanity, not the ease, or the pleasure, which interests us." (TMS, I, iii, 2, § 1)

It seems safe to conclude that Smith's view of society and its development was not "materialist" or "economic" in the sense that he held all human motivation to be ultimately of a materialist or economic kind.⁹⁰ The alternative understanding of this interpretation of Smith would be that the situational factors which influence mankind as far as the maintenance and development of society is concerned are "material" or "economic".

I suggest that this is not a tenable view either, for throughout Smith's account of the development and function of society he refers to a number of non-economic factors with determining influence. On the most general level it is well-known, but well worth to stress, that a commercial society, according to Smith, cannot function without a firm legal framework:

"Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in

enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government." (W.o.N., V, iii, § 7)

As we know from our sketch of the development of society above, it is also Smith's opinion that the commercial society would never have developed in the first instance if the cities had not provided regular government through general rules, as well as security.

Equally Smith attached the greatest importance to the professionalization of judges and the development of independent courts. He even went so far as to suggest that the fact that the "Roman State ... continued in its grandeur for above 500 years", whereas the "Athenian state did not continue in its glory for above seventy years" is "in great measure" to be attributed to the circumstance that the "courts at Rome were much more regular and in better order". (*Rhetoric*, p. 173)⁹¹

The importance of laws and institutions for the possibilities of social change is also shown by situations where they directly halt, or at least slow down, developments which are economically quite possible:

"China seems to have been long stationary, and had probably long ago acquired that full complement of riches which is consistent with the nature of its laws and institutions.

But this complement may be much inferior to what, with other laws and institutions, the nature of its soil, climate, and situation might admit of." (W.o.N., I, ix, 15)⁹²

It is hardly necessary to continue this list to make it clear that amongst

the situational factors facing men at the various stages of society there are quite a number of non-economic and particularly legal and institutional ones. It may, however, be necessary to comment briefly on another aspect of what is usually understood by a materialist conception of history, namely that it is deterministic. Although it is never made terribly clear it seems that those who see Smith as a materialist of sorts also think of his view of history as deterministic. Thus Professor Meek:

"Everything in society and in history was bound together by a succession of causes and effects. ... Society developed blindly, but not arbitrarily."⁹³

Whether arbitrarily or not, Smith certainly does allow for accidental events of historical importance. The all-important securing of English liberty through the development of independent and professional law courts was thus a matter of chance. When the sovereign got too busy and when the honour attached to the regulation of justice declined, he would simply leave it to a few other men to act as judges:

"And it may be looked upon as one of the most happy parts of the British Constitution, though introduced merely by chance and to ease the men in power, that the office of judging causes is committed into the hands of a few persons whose sole employment it is to determine them." (*Rhetoric*, p. 170)

Equally it seems hard to find the law of history which would determine that Elizabeth I, rather than one of her predecessors, "sold the royal demesnes" "[i]n order to supply her exigencies", thus decisively weakening the Crown politically for future generations.⁹⁴

Apart from chance, political intervention also plays a significant role in the progress of history. Smith's criticism of mercantilist policies and his alternative policy recommendations probably constitute the most substantial illustration of his belief in the efficacy of politics. It is, however, not only a wish for the future but a fact of the past as well. There are many examples of this. A significant one which we have already mentioned is the royal support to the developing cities. As a final and rather dramatic example we may take a problem of defence. We have already met examples of the importance Smith attaches to security as a vehicle for the development of civilization and in one place he even declares that "defence ... is of much more importance than opulence". (W.o.N., IV, ii, 30) Accordingly it is a significant element of his sketch of the development of society to show how the people's attitude to defence, and hence the form of armies, changes with the different stages of society.⁹⁵ This is well-known and needs no comment. Particularly well-known is Smith's idea that

"When a country arrives at a certain degree of refinement it becomes less fit for war." (*Justice*, p.26)

This has a number of important consequences, but the heart of the matter is that it tempts such a developed society to depend on barbarian mercenaries for its defence and consequently it becomes an easy prey for these less developed people. It is in this way Smith accounts for the fall of the Roman Empire. The idea that "arts and commerce", when far advanced, tend to weaken the defence of a country is, however, taken up again when Smith deals with a much later stage in history. He simply declares that

"This is our present condition in Great Britain." (*Justice*, p. 261)

It is following this observation that Smith introduces a number of policy recommendations for how the problem could be avoided.⁹⁶ This is quite important for it shows that what seemed a natural consequence of the development of society can actually be countered by political measures and civilization thus be rescued from the kind of downfall which it had suffered in a similar situation earlier in the history of mankind. It should, furthermore, be stressed that these political measures are meant to thwart strong "economic" motives, for they consist essentially in getting landowners to divert part of their time and energy away from their farms and businesses in order to become officers, recruiting men to the army. There is thus no necessity that modern Europe will meet the same fate as ancient Athens and Rome. Among many other things it depends on the politics of governments. In view of this and similar examples of the efficacy of politics and in view of the influence of what Smith called chance we may seem to be led to the conclusion that Smith, far from having a deterministic view of history, saw a number of indeterminist factors in the progress of history.

It would seem to the present author that the choice between determinism and indeterminism in history, as far as Smith is concerned, is a false alternative if we by indeterministic understand "arbitrary" (cf. Professor Meek above). As a good Newtonian Smith, of course, did not believe that there existed any arbitrary or undetermined events if this is taken to mean that there is no more reason why event x should happen than why non-x should happen. This does, however, not mean that someone with Smith's views is forced to adopt a "hard" determinism. With phenomena

as complex as human society there will nearly always be a number of directions in which things can develop and which direction is taken will depend on a multiplicity of factors, ranging from "hard" determining ones, like the absence of sea transport for a country, to "soft" determining factors, like an individual's appraisal of his social standing. This means that although we in our social explanations often will be unable to point out the necessary and sufficient conditions of events, we will yet be able to make these events intelligible to some extent by pointing out some of the more or less necessary conditions. If we e.g. return to Elizabeth I's sale of the royal demesnes, we will find that it was not totally arbitrary in the sense that she might as well not have sold the property. But neither was it an absolute necessity that she sold it; other funding sources might have been found, the sale might have been delayed, her value scale might have been slightly different, one of her predecessors might as well have sold the property, etc. Smith gives a reason which makes the Queen's action quite *intelligible* but which is anything but a compelling cause. She did it

"In order to supply her exigencies" and because "she knew

that none of her offspring was to succeed her." (*Justice*, p.44)

Much the same interpretation can be given of how political action can find some scope in history.

It is not my intention to suggest that Smith *deliberately* tried to go between the traditional alternative between determinism and indeterminism in history. What I am suggesting is that he in his actual historical and social explanations did go between the two alternatives and that it is only if we read him in this way that we can make full sense of these explanations.

This method of explanation has, I suggest, much in common with what has in modern times been called situational analysis, for it seems clear that what Smith is trying to do is to,

"give an idealized reconstruction of the *problem situation* in which the agent found himself, and to that extent make the action 'understandable' ..., *that is to say, adequate to his situation as he saw it.*"⁹⁷

In such situational analyses it is obviously of importance to make clear whether "situation" is taken in an objective or a subjective sense, i.e. as the historian thinks that the situation in fact was, or as he thinks the agents in the situation saw it.⁹⁸ As we can now see, Smith is on this point clearer than nearly any other social thinker, for the central point in his method of explanation is to show how the objective situation "softly" determines the subjective situation, which is again necessary in order to understand how a new objective situation arises.

We should now be in a position to gather the fruits of our lengthy discussion of the materialist interpretation of Smith's views of the development of society. Firstly, I think I have shown that the principles governing the formation of men's motivation are not of a materialist or economic character. Secondly, I hope it has become clear that the situations which give the specific content to men's motivation contain many factors beside the material and economic ones. And finally, I have argued that in so far as an economic view of history is taken to be determinist it can, for that reason too, not be Smith's view.

At the outset of this discussion I quoted Mr. Skinner's suggestion that Smith comes

"close to Engels's general position in arguing that the economic finally asserts itself as the 'ultimate', rather than as the sole, determining factor."⁹⁹

I pointed out that this can mean two quite different things, either that all non-economic social phenomena can be explained as ultimately determined by economic factors, or that economic factors are always amongst the determinants of social phenomena and hence will ultimately have to be referred to. In other words, is the suggestion that economic factors in the end are the necessary and sufficient conditions to be referred to for an understanding of society and its development, or is it that they are only necessary conditions?¹⁰⁰ The former, which would undoubtedly have been Engels's view, is clearly untenable as an interpretation of Smith in view of the arguments produced above; but the latter would seem to be a fairly accurate description of Smith's views. This explains the great emphasis he always lays upon the economic elements in men's changing situations through history and, particularly, it explains why he can use the mode of subsistence as the basis for his rough division of the development of civilization into four broad stages. At the same time it does, however, also allow scope for all the non-economic factors of which we have seen a number of examples. That this is exactly Smith's view of the place of "the economic" in history and society is in fact spelled out with admirable clarity:

"Opulence and commerce commonly precede the improvement of arts and refinement of every sort. I do not mean that the

improvement of arts and refinement of manners are the *necessary consequences* of commerce, - the Dutch and the Venetians bear testimony against me, - but that [it] is a *necessary requisite*." (*Rhetoric*, pp. 131-32, my italics)

And in a similar vein he points out that

"Commerce gave the lowest of the people an *opportunity* of raising themselves fortunes, and by that means power."

(ib., p.144, my italics)

It does, of course, not matter whether we call this an economic or materialist view of history and society, but in view of the usual connotations of these terms it seems highly misleading and, as we have seen, it has in fact misled. Smith's view is much more accurately described as pluralistic. There is at any given stage of society a multiplicity of situational factors influencing men and thus society in multiple ways. This is nowhere shown more clearly than in Smith's list of factors which shape the course of positive law and make it deviate from natural law:

"Sometimes what is called the constitution of the state, that is, the interest of the government; sometimes the interest of particular orders of men who tyrannize the government, warp the positive laws of the country from what natural justice would prescribe. In some countries, the rudeness and barbarism of the people hinder the natural sentiments of justice from arriving at that accuracy and precision, which, in more civilized nations, they naturally attain to. Their laws are, like their manners, gross, and rude, and undistinguishing. In other countries, the unfortunate constitution of their courts

of judicature hinders any regular system of jurisprudence from ever establishing itself among them, though the improved manners of the people may be such as would admit of the most accurate." (VII, iv, § 36)¹⁰¹

The materialist or economic interpretation of Smith's view of history and society provided the greatest single obstacle to the interpretation of his theory of natural justice suggested in the present Chapter. Once we have seen that his view is thoroughly pluralistic and that he sees history as an open-ended process, it becomes clear that he is very well able to find a place for natural justice as an "active" social force. It can be an element in the social and political situation in which people have to act but it will only be one element amongst others and, as shown by the list quoted above, there are at various stages of society enough elements to subdue it more or less completely. But if the situation is right, as it often is in a highly developed commercial society, it may very well be a worth-while social and political contribution for a philosopher, like Smith,

"to give an account of the general principles of law and government"

but since these principles can only be understood with a reference to the situations where they are applied, he would have to extend it to include an account

"of the different revolutions they have undergone in the different ages and periods of society". (TMS, VII, iv, § 37)¹⁰²

C H A P T E R I V

NATURAL JUSTICE IN MILLAR AND CRAIG

Section 1. Moral Approval and Disapproval

In the previous two chapters we have followed the development of a highly original theory of natural justice by two great philosophers.

In the present chapter we are going to see how this tradition is continued, but also changed and in the end dissolved, in the work of two much less well-known thinkers, John Millar and John Craig.

Millar's published work is mainly historical, as well as sociological, and the crucial question which, as we will see, ultimately led Craig to a dramatic change in the theory of natural justice was that of the role of history within the theory. But until we face this important problem, and also in order to locate it correctly, we will treat Millar and Craig more or less as one, for in everything else they are in basic agreement. I will use all the relevant texts by both; the *Ranks*, the *Historical View*, the *Sidney*, the 'Life', and the *Elements*. The last mentioned will, however, be our leading text until the problem of the role of history arises, since it is by far the most coherent and extensive treatment of our theme.¹

The theory of justice in Millar and Craig is firmly founded in a general theory of moral evaluation. Just as in Hume and in Smith it is to a large extent a theory of the relation between morality and law. Law is a branch of ethics, but a peculiarly distinct branch which must not be confused with the rest. The former is dealt with in jurisprudence, the latter in the flimsy discipline called casuistry.²

In order to understand this it is necessary to see what the general principles of moral evaluation are. Accordingly we find that both in Millar's Civil Law lectures and in Craig's *Elements*, there is a substantial treatment of those principles, and they even find a prominent place in a polemical pièce d'occasion like the *Letters of Sidney*.³

It cannot be said, however, that this part of the Millar-Craig theory is of anything like the importance of Hume's and Smith's theory of morals. It is in fact little more than a summary restatement of Hume and Smith, and consciously so:

"Mr. Hume and Dr. Smith had written treatises [on the principles of Moral Approbation], equally eloquent and ingenious; and, to Mr. Millar, little appeared to be wanting, but to combine their systems."⁴

The starting point is the well-known distinction between judging an action on the background of its "causes", i.e. its motives, and on the background of its consequences [*Elements*, I, 1-2, 'Life', xxviii-xxx, *Historical View*, IV, pp.272-74]. The former gives us judgements of the propriety, the latter of the utility of the action. Propriety is accounted for in terms of spectator sympathy as in Smith [*Elements*, I, 3-8, 'Life', xxx-xxxii], although with rather little detail. Craig is clear in his mind that the sympathetic comparison of motives between the spectator and the agent leads to pleasure/pain, and that those passions are the foundation for the

spectator's judgement of propriety/impropriety [*Elements*, I, 5-7]. And he also makes it clear that our judgement of others forms the principles for our judgement of ourselves [*ib.*, 7-8].

Both Millar and Craig do, however, announce that they have an addition to this theory. Propriety/impropriety are not absolutes; they must be seen in the context in which they occur, and only if the action judged of somehow is above or below what custom and habit would lead us to expect in the context, will we actually form a judgement of propriety/impropriety. In short, there must be some "wonder and surprise" effect. To claim that this is new, as both Millar and Craig do, or imply,⁵ is rather surprising and leads one to wonder how they could forget Smith's chapter 'Of the amiable and respectable virtues'.⁶

Judgement in terms of propriety/impropriety has much in common with aesthetic judgement and is not as such inducing us to any action beyond the judgement itself. When we judge an action in terms of its effects, however, [its "utility", positive or negative], we are likely to act in accordance with our judgement. Our approbation/disapprobation takes the form of a desire to reward/punish the acting person, but against this our judgement of the propriety/impropriety of the action in question is a check [*Elements*, I, 16-17, 'Life', xxvi-xxxi]. Our moral judgements would thus seem to be a combined result of propriety and utility.

While it is fairly clear how we come^{to}/judge of an action according to its consequences when we ourselves are the objects of it, an

explanation is needed of how we come to judge according to this principle when others are the objects of the action. Millar and Craig here again take resort to the sympathy mechanism, and although they are never very specific about the exact nature of sympathy, it seems fairly clear that they follow Smith:

"The spectator ... sympathizes with all the emotions of him who is immediately affected by an action. When he attends to its consequences, he perceives that it occasions some degree of happiness or misery; by sympathy, he feels a portion of these sensations, a degree of pleasure or of pain associated in the strongest manner with the action." [*Elements*, I, 18; and cf. 'Life', xxvii].

This sympathetic reaction will again often extend to helping the patient in rewarding/punishing the agent [*Elements*, ib.]. In general the feelings of the patient and the sympathetic reflections of them in the spectator hold proportion to each other; but there are some exceptions to this.¹ Passions which are too strong for the situation are not sympathized with.² Under certain circumstances passions which are too weak, or even quite missing, can yet have sympathetic "opposite numbers", although, in general, approval of the *level* of a passion is necessary for sympathy.⁷ 3. Sympathy with gratitude is much more complete than sympathy with revenge.⁴ And surprise and admiration can heighten the sympathetic feelings disproportionally; here the spectator's imagination plays a role, which Craig very nicely illustrates through an analogy with Poussin's 'Massacre of the Innocents'.⁸ In the same way as we

judge of the actions of others according to their utility, in the same way do we judge of our own actions, acting as spectators of ourselves.⁹

Basically our moral evaluation of actions is a function of considerations of propriety and utility in the way sketched. This is, however, not the full story. There is a third, complicating factor which Millar and Craig call indirect utility.¹⁰ Men are creatures of habit and they tend to classify motives and actions according to the good or bad overall effects they have, i.e. effects beyond the immediate and intended ones. And those classifications will very often gain some independent force over our moral judgements, so that they constitute a third standard of evaluation beside propriety and [direct] utility. It is in this way that we typify persons and motives to such an extent that we often overlook the propriety/impropriety and [immediate] merit/demerit in the concrete case before us,¹¹ and it is also in this way that general rules gain their importance in morality. General rules about actions stand out as *de facto* patterns in human behaviour and form our habits about what to expect from an action of a given kind. Whenever a new specimen of action occurs we associate it with the kind to which it belongs, and from this we associate to the general value of that kind of action. If that value is, say, positive, we will tend to evaluate the new specimen positively; and if it is a future action, we will regard it as a duty that it be carried out.¹² The indirect consequences of an action, which may never have entered the mind of the agent, will in this way gain quite some force in our moral evaluations.¹³

Summing up, we can say that for Millar and Craig moral approval and disapproval are given on the basis of considerations of propriety/impropriety and utility/disutility. The former we judge of through sympathetic understanding of the situation of the agent, the latter by sympathetic understanding of the situation of the patient. Both judgements in terms of propriety and in terms of utility are considerably influenced by whether the action in question is customary and expected or novel and surprising. A similar influence arises from the unintended consequences which we expect from the action, or motive, according to the *kind* of action it is, i.e. particularly the general rule under which it falls.

Before we leave this account of Millar's and Craig's basic principles of moral evaluation, it is important to make sure that we do not misunderstand their extensive use of "utility". Nowhere does this concept take on anything like a utilitarian shape. It is always kept in the broad terms of that which somehow benefits another, and benefit seems simply to mean that which creates feelings which we, as spectators, can sympathize with. In other words, the concept seems, in spite of its vagueness, to be the same as in Hume and Smith, and our authors make it clear that they see this ancestry:

"Mr. Hume, in his Enquiry concerning the Principles of Morals, has accumulated a vast variety of observations to illustrate the power of utility over our moral sentiments. That it is by sympathy with the feelings of the person who is benefited that the spectator derives pleasure from utility can scarcely be doubted".¹⁴

Section 2. Of Positive and Negative Virtues, and in Particular of Justice.

From the principles of moral approval we are naturally led to that which we approve of, the moral virtues. Craig divides the virtues into two main groups, the self-regarding or personal, and the other-regarding or social virtues. The former he again divides into the three classes of prudence, temperance, and fortitude; the latter he divides into two groups, benevolence and justice.¹⁵ This well-known division of the subject is also found in Millar's *Historical View* where he, however, deals with it from a sociological and historical point of view, asking about 'The Effects of Commerce and Manufactures, and of Opulence and Civilization, upon the Morals of a People'.¹⁶

There is no need for us to go through the personal virtues in any detail. The only important thing for us to notice is the principle upon which they are distinguished from the social virtues. As the personal virtues do not directly affect anybody but the agent himself, they do not create any gratitude in spectators, nor does the lack of them create any resentment; and hence they do not call forth either desire of rewarding, or desire of punishing. We will feel some pleasure/pain when we observe such virtues/vices, but nothing like gratitude/resentment.

Craig never makes it quite clear in those pages¹⁷ whether or not the personal virtues are judged of in terms of both propriety, direct and indirect utility, or only in terms of propriety. At one place he does drop a remark which could be read to support the latter view. He says

that Smith

"explained that ... sympathy with the motives of the agent, without which it would be difficult to account for the high estimation of the personal virtues."¹⁸

But read in the context it would seem that all he means is that utility alone could not explain "the high estimation of the personal virtues" and that we in fact combine it with consideration of propriety. He does also talk freely about the benefit to ourselves of the personal virtues. Furthermore it seems rather implausible to deny that we do judge of the personal virtues both in terms of propriety and utility. This, however, leads to a question in connection with the distinction between personal and social virtues/vices. The utility/disutility of the former does not evoke action, that of the latter does. There thus seems to be two kinds of utility, and Craig would have needed a more elaborate account of the relationship between individuals in order to explain this.

Apart from that, we should remark that Craig already in dealing with the personal virtues draws attention to the asymmetry between virtues and vices, pointing out that the spectator reaction to the latter is stronger than to the former, except in special circumstances. He makes this point rather clearly in connection with the personal virtue of temperance, where he remarks that,

"The approbation of the virtue is calm compared to the warmth with which we reprobate the opposite vice."¹⁹

Whereas this distinction between "positive" and "negative" is one of degree in the personal virtues, it is one of kind in the social virtues.

It is simply the basis for the distinction between benevolence and justice, and it is this way of reasoning which sets justice off as a unique virtue.

The social virtues are distinguished from the personal because the former concern the happiness of others, whereas the latter only directly concern the agent himself. All the virtues which directly tend to increase the happiness of others Craig calls benevolent; those which tend to prevent that the happiness of others is diminished he labels justice [*Elements*, I, 63].²⁰

We judge of benevolence, firstly, in terms of propriety, secondly in terms of utility [ib., 63-65]; but it is remarkable that it is impossible to have these judgements directed by general rules. Firstly, if an act of benevolence were done out of respect for a general rule, we would not really consider it as benevolent, for it was done out of respect for the rule, rather than out of benevolent motives [ib. 65-66]. Secondly, while the existence of general rules is the sign of some certainty in our judgement, men's approval of benevolence is exactly the opposite of certain. A spectator has to take into account the situation of the agent, i.e. whether he really acts out of benevolence; the situation of the patient, i.e. whether the action judged of really is to his benefit; the relation between the action judged of and other possible actions, i.e. whether the action really *ought* to be done in the situation.

"How is the spectator to find his way in this labyrinth?

How is he to weigh all these circumstances, so as to

decide with certainty that the action ought to have been performed, or that it should be enforced?"

[*Elements*, I, 68].

When, however, "the rules of beneficence are lax in their nature and uncertain in their application" [ib.] it becomes equally uncertain whether they in any given case really have been transgressed or not, and for that reason it is impossible for us to enforce them by punishing their transgression.

Furthermore, the withholding of benevolence does not change the previously existing situation, it does not positively inflict any injury or harm on another person, and hence it does not give rise to resentment on the part of the spectator. Lack of benevolence may be disappointing and betray an unpleasant and immoral character, but it can only lead to moral contempt and indignation, not to punishment [ib. 66-67]. Accordingly Craig can conclude that,

"The science of casuistry, which undertook to lay down rules of beneficence applicable to a variety of circumstances and situations, has become a generic name for that subtlety of distinction which, unfounded in the nature of things, leads only to perplexity and error." [ib. 69].

Benevolence is a virtue on account of our approval of it from considerations of propriety and direct utility, and experience teaches us to appreciate it for its long-term benefits as well [*Elements*, I, 65].

In the case of justice, the approval which renders it a virtue is given somewhat differently and hence it becomes a rather different kind of

virtue. Propriety is a necessary condition also here, and that of the strictest kind [ib. 69]. This does not in itself lead to any very active and positive approval, for the ordinary expectations of propriety are so high that only very unusual circumstances such as a conflict between justice and positive law will render "an act of mere justice" so surprising that it will call forth that admiration which is a necessary element in positive approval [ib. 69-70]. As to direct utility, "an act of mere justice" in a way has no such utility for

"the tendency of this virtue is not to confer happiness, but to prevent injury; not to increase enjoyment, but to hinder the destruction of that degree of welfare which already exists. After the most signal act of justice, every thing remains as before; no one is rendered happier, no distress is removed." [ib. 70-71].

Accordingly no positive approval is given on this account,

"There is here no room for gratitude, which is excited by benefits, but which never seeks to reward mere forbearance." [ib. 71].

Justice can, then, only be constituted a virtue by its indirect and long-term utility, i.e. in so far as it is a general rule:

"The approbation merited by justice seems ... to arise principally from the support which every instance of this virtue affords to a most important rule of conduct."
[ib. 72].

In contrast to any attempted rule of benevolence, this general rule of justice is exceedingly clear and definite for it is purely negative,

a prohibition which tells man to abstain from injury. Although the rule is simple and easy, the approval we bestow on the virtue of justice is, however, always much weaker than the approval of benevolence, for the former springs "from remote and less obvious views of utility", whereas the latter to a large extent proceeds from direct utility [ib. 72-73].

If we, however, look at the corresponding vices, the picture changes completely. Whereas the spectator's ^{AC}reaction to lack of benevolence is limited and always falls short of actual resentment and desire of punishing, the reaction to injustice is always very strong, and consists of sympathetic resentment and a wish to have the unjust person punished. This proceeds from a view of the direct disutility [injury] of the unjust action,²¹ and it is strengthened from fear of the character which is evinced by the action as well as from a regard to the necessity of the rules of justice [ib. 73]. The spectator reaction in the case of injustice is not only strong; it also contrasts with the case of lacking benevolence in being clear and certain; and this is the case because injury is always immediately recognizable as such [ib. 74].²²

It is, then, only by understanding the vice that we gain insight into the virtue. Injustice is clear and meets with strong reaction and we do not understand justice till we see that it simply consists in abstaining from injustice. It is in this sense it is a negative virtue, and it is hence that the rule of justice derives its clarity, for,

"This rule is not, as in beneficence, indefinite in its extent, or difficult in its application. To abstain from injury is a maxim clear in its import, and independent of all contingent circumstances."

[*Elements*, I. 72].

It is those qualities which make justice the basis for "the introduction and province of all law, which aims, not at inspiring virtue, but at repressing one species of vice." [ib. 74].

It is the same qualities which distinguish justice from all other virtues, personal, or social, and give it a special importance,

"The personal virtues may be neglected without bringing suffering upon others; beneficence may be disregarded, not indeed without preventing possible happiness, but without occasioning additional distress; but justice is the key-stone of society, the removal of which would at once crush to atoms human industry, and human enjoyments."

[ib. 73-74].

Clearly this view of justice is, at least in broad outline, the same as the one we have traced in Hume and in Smith. It is not just to be found in Craig's *Elements*; it is prominent in all the other Millar-Craig sources which we have decided to use in the present discussion, a claim which I now want to document, since the theory is our main theme.

In his significant Essay [No. VII] on 'The Progress of Science

relative to Law and Government', in Volume IV of the *Historical View*, Millar starts off with a clear statement of

"this remarkable difference between justice and the other virtues, that the former can be reduced under general rules, capable, in some degree, of accuracy and precision; while the latter, more uncertain and variable in their limits, can frequently be no otherwise determined than from a complex view of their circumstances, and must, in each particular case, be submitted to the immediate decision of taste and sentiment." [*Hist. View*, IV, 266-267].

Millar goes on to describe how justice only requires that one abstains from injustice against others, and concludes this side of the matter by saying that,

"The line of duty suggested by this mere negative virtue, can be clearly marked, and its boundaries distinctly ascertained. It resembles a matter of calculation, and may, in some sort, be regulated by the square and the compass." [ib.].

This contrasts sharply with the ambiguity, uncertainty, and consequent lack of rules in the other, positive virtues:

"the other virtues, those more especially which lead us to promote the positive happiness of our neighbours, admit of a greater variety of aspects, and are of a more delicate nature. What is the precise behaviour consistent with the most perfect friendship, generosity, gratitude, or other benevolent affections, may often be

a difficult question; and the situations which give rise to the complete exercise of those virtues are so diversified by a multiplicity of minute circumstances, that there seldom occur two instances altogether alike; and there is no room for determining any number of cases according to the same general view." [ib. 267-68].

Millar goes on to give a brief sketch of the history of mankind's futile attempts at bringing some system into the multiplicity of moral life [ib. 268-75], and he then contrasts this with the clarity and simplicity of law which develops out of our basic sense of justice. It should be added that although Millar clearly is reluctant in those essays to get involved in discussions of basic moral philosophy, he does make it plain that he subscribes to a sentimental view of moral values,²³ and that he treats them from the spectator point of view.²⁴

That Millar held this view of justice is confirmed with all the clarity we could wish for in Craig's brief description of the Lectures on Civil Law in the 'Life'. First the distinction between positive and negative and the difference in spectator reactions:

"The rules of justice²⁵ ... are satisfied, when a man abstains from injuring others, although he should make no addition whatever to general or particular happiness. He who fails in prudence, in temperance, in courage, or beneficence, may become an object of dislike; he may destroy his own happiness, and disregard many opportunities of promoting that of others; but, having

done no direct injury, he can scarcely become the object of general indignation. The infringement of the rules of Justice, on the other hand, never fails to excite resentment in the breast of the person injured, and indignation in that of the spectators." ['Life', xxxii-xxxiii].

Then the clarity and precision of justice:

"The rules of conduct prescribed by Justice, unlike the dictates of the other virtues, are always clear and precise. Frequently it may be a matter of some difficulty to determine what measure, in the particular circumstances of the case, may be most prudent or most beneficent; but never can any person be at a loss to know, when he deliberately diminishes the comforts or enjoyments of others, or be unconscious, that by so doing, he renders himself the object of merited punishment." [ib. xxxiii].

Finally, justice in this sense is the basis for all law:

"For these reasons, it is on the virtue of Justice, and on that virtue alone, that Laws, the object of which is to maintain rights and repress injuries, must be altogether founded." [ib. xxxiii-xxxiv].

On the background of all this it is hardly surprising that this view of justice is clearly implied in the central passages of the decisive ninth of the *Letters of Sidney*, where the author shows how the ultimate justification of property is that it is a basic rule of justice.²⁶

Section 3. Natural Rights

We have now been presented with some of the most basic elements in Millar's and Craig's theory of justice, and we have seen that they intend this as the foundation for a full theory of law. In order to see how they pursue this intention, we will first see how evaluations in terms of justice lead to natural rights, and we will then explore how those natural rights are the objects of protection by the rules of natural justice, or "natural law". The former discussion will show us how there can be special rights pertaining to government, i.e. how government can be justified; while the latter discussion will show us the boundaries within which government can operate, i.e. the relationship between positive law, as well as institutions, and natural justice. This is, of course, the strategy used in the most extensive and detailed of our texts, Craig's *Elements*. In the shorter works the two correlative ideas of natural rights and natural law are treated together, but basically the same points are made, as we will see.

Craig begins his treatment 'Of the Natural Rights of Man'²⁷ by taking the same view of the state of nature as Hume had done, that is to say, although man is always and everywhere a social being, and the state of nature therefore a fiction, it can nevertheless be a useful methodological device, "for the purpose of abstracting all considerations of custom, institution, or convention" [*Elements*, I, 85]. This is quite necessary, for behind all the changes brought about by "positive law or ancient custom" are "those rights of man, which, being founded on his original constitution, prevail in every country, except in so

far as they have been modified by particular laws or forms of government". [ib.].

If we in this way found our view of the rights of man, "not on accident or particular systems of policy, but in the universal and unvarying principles of human nature" [ib. 86], we will get a simple and clear picture of these rights: we have a right to every action which does not damage another person. As was done earlier, we can distinguish between self-regarding and other-regarding actions. Now, clearly we have a full right to all the former, for by definition they do not do positive injury to others and hence they do not give rise to that resentment which is the starting point for punishment. Furthermore, if they were restricted by punishment, this interference would in itself constitute injury and be unjust. [ib. 86-87].

Although our rights to perform self-regarding actions are unlimited, we may yet have a duty not to perform certain of them, namely a moral duty.

"In such instances, duties and rights are not correlatives. It is the duty of every man to be prudent and temperate; but this is a duty which he owes to himself, and which gives rise to no corresponding right in others." [ib. 87].

In other words, morality lays its restrictions on men's behaviour, even regarding themselves, but it cannot do so by being enforced as law. In the case of other-regarding actions we must distinguish between those which are beneficent and those which are harmful. The former we, of course, have a complete right to perform as long as this does not involve any injustice. On the other hand we have no

obligation to perform them, for no spectator would go along with the enforcement of them. In that sense benevolence is free. We may have a *moral* obligation to perform certain benevolent acts, but that does not involve any other constraints than the moral opinions of our peer group of spectators [ib. 87-89]. Otherwise with those actions which are harmful: these we have no right to perform, for they are excluded by two opposing rights, "those of self-defence, and of punishment". Self-defence and punishment are natural reactions to damage about to be inflicted and damage actually inflicted, respectively. To the extent that those reactions are performed in such a way that the spectators can go along with it, to that extent they are natural rights [ib. 89-90]. Craig can then conclude that there are "two great classes" of natural rights:

- "1st. Rights regarding our own actions, which extend to every part of our conduct not injurious to the equal rights of others: and,
- 2nd. Rights regarding the actions of our neighbours, which extend to self-defence, and to the punishment of crimes affecting our security and happiness." [ib. 91].

Craig goes on to point out that there are those who have denied the existence of all rights because, one action always being better than the alternatives, man will in every situation have a duty to perform one particular action. As an example he quotes Godwin for this view. This is, however, a confusion which arises when one neglects the clear distinction between justice on the one hand and all the positive virtues on the other. Only the former can be enforced, while all the others cannot. Hence we are, so to speak, faced with two different

kinds of duty.²⁸ Finally, Craig shows how clearly he had thought about these matters by pointing out the ambiguity of the concept of "right":

"Right, used as an adjective, expresses what is morally proper, what is virtuous; used as a substantive, it denotes either a claim against another founded in strict justice, or that discretionary power over one's own person and property, which cannot justly be controlled. [ib. 93].

Section 4. Natural Rights and Positive Institutions

If we accept the view of justice outlined earlier, the argument leads us to the conclusion that, in Millar's words, "There are natural rights, which belong to mankind antecedent to the formation of civil society".²⁹ However,

"When we look around us in the world, we cannot fail to perceive that those rights, which arise out of the principles of human nature, have in all ages and countries been greatly circumscribed." [*Elements*, I, 94].

So in order to see the full import of the natural rights, we must explore the rights and the wrongs of this circumscription. Craig does this, firstly, by discussing the justification of having an authority which can curtail natural rights at all, i.e. he discusses the rights of government; and, secondly, by showing what authority natural rights ought to have in civil society. The latter question is discussed in

the final Section of Chapter 1, while the rights of government are discussed in the intervening three Sections [2-4]. Here I will, however, reverse the order so that the rights of government can be dealt with in direct connection with the subject of the following Chapter II, 'Of the Distribution of Political Power'.

It is all very well that we can show that men have a large number of natural rights, when we abstract from the existence of society and all its positive institutions. We do, however, know that man is always living in social groups, so the really important question is, what happens to the natural rights when we consider man in those circumstances in which he is in fact to be found.³⁰ Millar's and Craig's answer is that,

"the natural rights of man must be considerably modified; but there seems no reason to believe that they are altogether relinquished."

[*Elements*, I, 134].

Nevertheless it has been maintained by Rousseau that all natural rights are abolished in society and that the only individual rights are those granted by society, i.e. civil rights. This view is completely implausible, according to Craig. For one thing, it would simply mean that individuals have no rights whatsoever against the state since the state itself is supposed to be the only source of all rights. Consequently any government, whatever its character, would have to be accepted. And although this in practice might not lead to any great dangers in the kind of utopian democracy Rousseau envisages, it would, as governments in this world go, often lead to despotism. [ib. 135-37].

Furthermore, this view makes the very rationale of government impossible to understand; For "the legitimate end of government" is "to *protect* the natural rights of man, and to increase the effects of his natural powers", but then, "Why should we suppose those very rights to be abandoned, which society was instituted to defend?" [138, my italics]. All that is required to this end is that, "man surrenders ... a small part of his natural liberty, to ensure the full enjoyment of the rest". Such are the "reasonable limits" within which "the demands of civil government are ... confined". [ib. 139].

Finally, Craig pursues this last point in a rather significant way. Theories like that of Rousseau normally exaggerate the amount of natural rights given up in society because they exaggerate the extent of those natural rights themselves. According to Rousseau they constitute "un droit illimité à tout ce qui le tente et qu'il peut atteindre", and "la liberté naturelle ... n'a pour bornes que les forces de l'individu".³¹ Clearly if nothing but the social ties restrict this state of complete licence, then it lies close to hand to see social life as a complete surrender of this state and its rights. But Craig has already argued that there are very important restrictions on our natural rights. They must not interfere with those of others:

"natural rights are strictly limited by that justice towards others which we never can have any title to disregard." [ib. 141].

Accordingly all that is necessary for social life is some further restrictions which "are less numerous and important than has usually been imagined." [ib.].

Clearly Craig is here arguing the old liberal point that whatever is not directly forbidden one has a right to do, whereas the view he is criticizing in Rousseau traditionally is summed by saying that only what is directly permitted does one have a right to do. He makes these points particularly clearly in the immediately following, where he first discusses how the natural rights to act at our own discretion³² are "in some degree abridged". In order for there to be a society at all it is necessary that each individual contributes something of his own "property, labour, and talents". The abridgment of these natural rights is specified for particular cases by means of

"positive laws directly restricting the natural rights of man, and thus virtually acknowledging their previous existence; and wherever such laws are not enacted, natural rights maintain their native force." [ib. 142].

The very language of the law shows that there are natural rights, for it is "prohibitory";³³ whereas if

"all the rights of individuals, by the constitution of society, [were] vested in the community, there would be no occasion for restrictive laws in any case, for whatever was not directly permitted would remain virtually prohibited." [ib. 142].

Also, the very fact that positive prohibitions necessarily are limited, while man's capacity for new ways of acting seems infinite, shows that even under the most despotic government restrictive laws must trail behind pre-existing natural rights [ib. 142-43].

The second group of natural rights, those of self-defence and of

punishment, are delegated in a much higher degree than the natural rights to act at one's own discretion, but they are "by no means surrendered, although the mode of exercising them be materially changed". Normally they will be exercised by society on behalf of the individual, indeed, protection and a regular administration of justice are among the main advantages to be gained by man from social life, according to Craig.³⁴ If society, however, fails to protect man, "the right of self-defence ... reverts to the individual". [ib. 145]. The natural right to punish injustice is given up more completely. This right does not consist of the blind revenge, which the injured often desires, but in that measured reaction which the spectators can go along with. It is extremely rare that this level of reaction is not achieved by the punishments which society in fact inflicts; for normally judges will have in mind, not only the damage to the injured individual, but also the damage to society, and hence be "apt to err by severity, much more frequently than by mildness." [ib. 147].

If just punishment is not achieved by society, the right reverts to the individual, and it is in this way that rebellion by slaves and tyrannicide is justified. [ib. 147-48]. Duelling is a, in Craig's eyes, more absurd indication that the right to punish in the end remains with the individual. [ib. 149-50].

The natural rights we retain constitute our sphere of individual liberty. This liberty must, according to Craig, be carefully distinguished from political power. We *may* have liberty without political power, and we may even have some degree of political power

without having much liberty, although it, of course, is unlikely and hard to imagine.³⁵ Now, if we keep this distinction in mind, we have the standard by which to evaluate the constitution of any society, independently of the question of who should have the political power to administer this constitution. The good constitution is the one which allows the maximum of individual liberty that is compatible with social life, i.e. with achieving those necessities and conveniences which Craig sees as the justification for social life.³⁶ Or in his own words:

"Here ... seems to be a standard entirely unconnected with the distribution of political power, according to which the constitutional laws of different countries may be appreciated. Those governments, whatever their forms may be, are most agreeable to the principles of justice, which diffuse the greatest portion of security and happiness, and call forth the highest exertions of intellect, and, at the same time, encroach the least on individual liberty."

[*Elements*, I, 143].³⁷

Section 5. Equality

It is on this doctrine of natural rights that Craig bases his thoughts on equality in society [*Elements*, I, 151-55], and the one lends its clarity to the other. It is clear that men are equal in their natural rights and it is also clear that what they basically need from social life is the same. When the fund out of which they pay and the goods

they get are equal, it seems obvious to Craig that the price ought to be the same, i.e. their natural rights ought to be restricted equally by society. This has two consequences. Firstly, the civil rights of citizens must be equal, for in fact

"civil rights are the natural rights of man, which, so far from being relinquished at the institution of government, continue vested in the individual, to be exercised either by himself or by the community for his benefit or protection." [ib. 151].

Secondly, since natural rights are restricted, and civil rights created, by positive laws, such laws must apply equally to everyone. This means that they must be strictly universal, and strict universality is not just a formal requirement to the formulation of laws, but a material requirement:

"it is necessary, not only that the same laws should extend to every individual in the country, without distinction of rank or wealth, but also that they should be so framed, as to occasion the same restriction of natural right to every class of the citizens. From want of attention to this principle, many statutes, which are perfectly general in their expression, are very partial, and therefore oppressive, in their operation." [ib. 153].³⁸

This doctrine of equality is obviously a further standard by which to test existing societies and their laws, and Craig does in fact outline a number of criticisms, which need not detain us here.

Section 6. Right of Government

A theory which, like Craig's, argues for strict equality of rights both in and out of society, is obviously obliged to account for that major inequality which everyone seems to acknowledge, namely the right of government. Craig faces up to this challenge in Sections 2 - 4 of Chapter II, 'Of the Nature and Limits of the Rights of Government'.

Craig first criticizes the two traditional justifications of the right of government, that it is a divine right, or that it is a right arising from contract.³⁹ He criticizes the divine right theory for being vacuous. If government is supposed to be justified because it must be God's creature, then any de facto government is justified irrespective of its nature, for everything in the world is in that sense created by God. So,

"By this system, it is plain that morality was altogether disregarded, superior force being set up as the sole umpire of right". [ib. 96].⁴⁰

If government is supposed to be justified as God's tool to create happiness in the world, then it is necessary first to show that government in fact does increase men's happiness. Moreover this argument from the utility of government is really one argument, whereas the problem of whether it in the end is dependent upon God is a further one.⁴¹ Craig concludes this argument by drawing that clear distinction between morality and religion, which is an element in the whole tradition of moral thinking with which we are here concerned, and which yet allows an understanding of their frequent

interconnection in the human mind:

"there are rules of morality which coincide with the dictates of religion, but which maintain their force in the human mind, even when our ideas of the divine nature are obscured by ignorance, or distorted by superstition." [ib. 99].⁴²

Next Craig presents Locke's theory of the original contract, continued by consent, [ib. 99-100], and then levels four points of criticism against it. The first point is the well-known one that it is rather impossible to find any natural beginning for this implied contract in the life of the individual citizen, and that it seems somewhat strange if a contract is supposed to come about piecemeal. Also it would mean that children and teenagers have an ambiguous status. In his second criticism Craig first makes the point that a contract must be based on understanding and *deliberate* consent in order to be called so; but this is precisely not the case with the social contract, which is supposed to be by a tacit consent which should be implied by a person's staying in the society concerned. This is, however, completely implausible, for only very rarely do people have obedience to the government as their motive for staying in a country. Normally,

"A man resides in the country of his forefathers from habit, from affection to his friends, from the greater probability of his being able to maintain himself, from his inability to speak foreign languages, from the expense of removal, from indolence, from prejudice".
[ib. 103].⁴³

If political tests should be enforced in order to make the contract explicit, this would in reality be a form of unjust oppression since the alternative to taking the test, i.e. to leave the country, would be no alternative for the majority of people. [104-105].

Furthermore, in assuming the right to enforce this test, the government is already exercising an authority which is supposed to rest on the test [105-106],⁴⁴ and, of course, the test would in practice become a meaningless formality [105].

The third criticism of the idea of implied contract is that it is completely unclear what its content is supposed to be. Is it obedience to the rulers? or to the constitution? or to all positive law and institution? There is no natural authority to decide this. If it is to the rulers that citizens are supposed to pledge obedience, is this unconditional? This is highly implausible and can not account for many societies, if any. If it is not unconditional, who is to arbitrate in disputes? [106-107]. If it is to the constitution that we are supposed to promise obedience, the theory cannot account for the factual loyalty of all those who cannot, or do not, understand such abstract principles [107-108]. And what is the constitution anyway? It is often [!] unwritten and can only be understood from precedents and practices stemming from a remote past.

The fourth criticism is that a contract, which is implied by mere presence of person or property in a country, only seems to be dissolved when one removes oneself or one's property or, alternatively, when the government for some reason collapses. This means that there is

really no rights left with the citizen as citizen, and hence no possibility for change, improvement, or resistance. [110-112].

This, in a way, is the main theme ^{throughout} / these criticisms: either the contract is simple and clear, but then it will be so narrow that it is implausible, that anyone should enter it; or it is elaborate and abstract, in which case the majority of the people would have no possibility of understanding it. Or in other words, the contract theory implies a rationalization of social life, which mankind in general is incapable of.

Section 7. Means and Ends, Power and Right

It being impossible to justify the rights of government in any of the usual ways, Craig naturally asks us,

"to look for their origin in those general principles of morals, according to which all the actions of man are approved or condemned." [*Elements*, I, 112].

Of those principles that of propriety cannot help us; it is only a necessary, not a sufficient condition for the approval of an action. So although it may be proper to obey the government, we do not on *that* account approve that such obedience is enforced. Or to put it negatively, it is not because disobedience is improper that we go along with punishment of it. We must, then, look to the consequences of submitting to government, its "utility", in Craig's terminology, in order to find the justification of governmental rights. [ib. 112-113].

The discussion which follows is extremely difficult to gauge. On the face of it, it may seem as little more than a rather elementary utilitarian justification of majority rule. I hope to establish that it in fact is somewhat more subtle than that.

At the outset it is important to notice that Craig does not just attempt to show that because government has such and such useful consequences, man ought to submit to it. Instead he begins by noticing that, as a matter of natural fact, men are always living together in social groups with some kind of organised authority, irrespective of how primitive a stage we turn to. He then goes on to show in broad outline what the consequences of this are, i.e. what men get out of the social combination. He divides this into five areas. The first thing men gain from submitting to the authority of an organized social group is protection against other groups, or tribes. The second is protection against other species of animals. [ib. 113-116]. Thirdly, men get protection against injustice from their neighbours. At first this takes the form of spontaneous spectator reactions, but out of this grows organized law courts and legislating institutions. [116-119]. Fourthly, men benefit from the division of labour, which Craig seems to take in the same broad sense of complete human interdependence as did Hume and Smith. And fifthly, when men have attained a more advanced civilization, they will be able to see the long term, general benefits of a cultivated way of life. [ib. 119-122].

Now, if men reflect on all this, they will see that they have an

immediate justification for submitting to the social authority. Indeed, they will be shaped by the social combination to such an extent that they can hardly live without it, although they, of course, have the right to try [122-123].

This argument from utility, which here virtually means necessity, is, however, only an argument for some kind of organised social life and not for any particular kind. In order to get any further Craig introduces some very interesting reflections on the political consequences of man's uncertain knowledge. It is clear that society exists to further the interests of all citizens in the five broad areas sketched above, but with respect to the exact means to this, "with respect to every form and every measure of administration, there is room for differences of opinion" [123]. In such differences all individuals are

"equal both in rights and in means of information, or at least there [is] no criterion by which superior talents or knowledge can be made evident". [124].

Lacking such a "criterion" there will never be any certainty in the direction a society is given and the form of government adopted, but as those things have to be decided upon, the best we can do is to follow the majority, not because it in any way is a guarantee of truth or justice, but simply because this will neglect the fewest opinions and rights. The power and direction of a society is thus completely a matter of opinion and no "criteria" are possible. This means that everyone always must be free to try and sway the reigning opinion, and this is the *only* way for a minority to seek change. If it actively

tried to impose its ideas on society, it would disregard the fallibility of human knowledge; and active resistance to the given majority is, in a way, to opt out of that social life which is so necessary to man, i.e. which is justified by its utility.

This must not be misunderstood to mean that a minority must put up with everything. Any individual will always retain his natural rights and will always be justified in protecting them [126]. Craig is quite clear in his mind that when he bases politics upon opinion, and when he sees opinion as something which is moulded by discussion, then politics becomes a process of continuous discovery [127] and this implies the possibility of continuous change.⁴⁵ He, however, does very aptly adopt Locke's distinction between society and government and points out that although the governmental system is susceptible to change as men get new ideas, this does not mean that the social framework is repeatedly dissolved and reconstituted.

This distinction, which is implied by Craig, is of the greatest importance. What he is really saying is, that man is in fact always living in society and that he virtually has to do so in order to be a man. In order for a society to cohere and function as a society it must be able to act in common, and yet men do not have any criterion for *how* to act or for *who* should execute the action. Or in other words, there is a need for government, and for that reason we approve of the right of government in general, but we have no means of placing this right infallibly with anyone in particular. Consequently, if a given government goes wrong, we have no other choice but to revert to general discussion. In such discussion the only certain points are,

that we ought to act within natural justice, i.e. to protect natural rights as far as at all possible, that we absolutely need society, and hence government, and that no one has any ultimate right of government.

That this is Craig's intention is shown by the very important opening paragraph of the following chapter 'Of the Distribution of Political Power' where he distinguishes between power and right, making it clear that no one has any natural right to political power:

"The portion of political power to which each citizen is entitled has been ranked by some authors among the natural rights of man.⁴⁶ Yet, between these two classes of rights, there are several distinctions both obvious and important. Natural rights exist independently of combination; political power is the creature of society; government is instituted chiefly for the protection of natural rights; but the power granted to each citizen, so far from being the object of government, is merely the means by which that object is attained: Natural rights, being founded on justice, are inalienable, and although they may be modified for the general good, they cannot be withheld, either by individuals or societies, without occasioning direct injury, which may be repelled or punished; but political power is a privilege created by the general will, and conferred on particular magistrates for general purposes; he who is

possessed of it, has no claim to it for his own advantage; he to whom it is denied, suffers no privation of his own enjoyments. The distribution of political power may be considered as the mechanism by which government protects natural rights, and augments public happiness". [*Elements*, I, 156-57].⁴⁷

In the whole of the literature it is difficult to find a better expression of the liberal priority of political values, of what is ends and what is means; and it is salutary to know, and must have been pleasant for Craig to report, that Millar agreed:

"however highly Mr. Millar valued Civil Liberty, he considered Personal Freedom as infinitely more important". [*'Life'*, cxi].

Millar was, of course, in complete agreement with Craig that the state is a means to protect natural rights [*Hist. View*, IV, 294-95], and in regard to the right of government he made the point that our natural rights, being based upon spectator reactions, are obviously relational, i.e. refer to other people. This is expressed by the law of natural justice, saying that we have a duty not to infringe upon the natural rights of others. This must be the background to Millar's idea that we have a derivative duty to find the means of implementing the former duty and that this means is a government:

"men, when they come into society, are bound to preserve the natural rights of one another; and, consequently, to establish a government conducive to that end." [*Hist. View*, IV, 301].

From which it would seem to follow that we have a duty towards *some* government, and that *some* government has the right to govern.

Whether or not Craig would subscribe to this particular way of arguing, it is obvious that it comes to the same general conclusion as he had come to.

Apart from this there is not much of philosophical interest in Millar's published work relating to the right of government. He mainly deals with "the principles of government" from a historical and sociological angle, dividing them into the two broad classes, well-known from Smith, the principle of authority and the principle of utility.⁴⁸ It is under the latter that he deals with the state as a means. Craig's discussion 'Of the Distribution of Political Power', which is of considerably more interest, evaluates the main political systems strictly as alternative means to a certain end, with natural justice setting the range of the possible. However important this discussion is in itself, it does, however, clearly fall outside our general argument and must be referred to an appendix.⁴⁹

Section 8. The Development of Law

The theory of law in Millar and Craig is in a way given with their theory of natural rights: just laws simply tell men to respect and protect natural rights. Their justification is obviously to be found in spectator reactions, the clarity, certainty, and strength of which distinguish law from mere moral duty:

"Law, as distinguished from moral duty, relates to all actions, with regard to which the interference of spectators, whether in enforcing right, or preventing wrong, is just and proper." [*Elements*, I, 274].

Law is the institutionalization of the clear, negative virtue of justice which I have described earlier in this chapter. Both in Millar and in Craig we find descriptions of how this occurs.⁵⁰

Their basic idea is that law grows spontaneously out of the conflicts of rights which are bound to arise when men are always living together in social groups. Although there in primitive society will be a tendency to decide such disputes by force, self-interest and social pressure will more often lead to some kind of arbitration. Normally men of some social standing are chosen as arbiters; as time goes by they will become more and more recognized as professional judges in disputes and in the end society will also provide them with the power to enforce their decisions. As the extent of the job grows, it tends to become a separate profession, which leads to the problems about the dependence of the judges upon the rulers and/or the people.⁵¹ But the professionalization of the judges has other consequences. As we know, it is a "propensity natural to all mankind" to see similarities between different events and on this background to form general rules. This obviously also happens in the case of decisions of disputes, but this tendency is greatly strengthened as it becomes a separate occupation for a certain group of citizens to decide disputes. They will tend more and more to look to previous cases to find precedents and they will become much more skilled in this than anyone else in

society. In this way the earliest known kind of law, consuetudinary or common law, grows out of spectator reactions which have been institutionalized as the reactions of a particular group of people, namely judges. As the complexity of the law grows and as people become increasingly aware of the utility of the law, people will begin to amend the laws handed down by tradition and the rules arising from this deliberate legislative activity constitute the beginning of statute law. The end result of this long development is that the law of a society has become a large edifice which, although it springs out of particular decisions, becomes a theoretical entity which is independent of individual cases, and even determines how we are to see new individual cases:

"The law is gradually formed into a great system, which, if not entirely consistent in all its parts, is rendered so by refinements, fictions, analogies, and metaphysical subtilties; and justice with regard to the particular matter in dispute is considered as of very inferior importance to the beauty, order, and stability of the law." [*Elements*, I, 279].⁵²

Law becomes the object of a new and independent science. But the important thing to notice is that "the men of system", as it were, can only come to work when the object is already in existence; they do not create it:

"General systems of Law have rarely, if ever, been formed by the prospective wisdom of legislators, but have arisen gradually, and almost insensibly, from the slow progress of human experience." ['*Life*', xxxiv].

Legislators cannot create law *a priori*, for they must themselves to a very large extent be creatures of the society they legislate for. Otherwise they would have neither the knowledge nor the authority to do so:

"Before an individual can be invested with so much authority, and possessed of such reflection and foresight as would induce him to act in the capacity of a legislator, he must, probably, have been educated and brought up in the knowledge of those natural manners and customs, which, for ages perhaps, have prevailed among the countrymen."
[Ranks, 6].⁵³

All that so called legislators can produce is some kind of adaptation of already existing law:

"It is even extremely probable, that those patriotic statesmen, ... whose laws have been justly celebrated, were at great pains to accommodate their regulations to the situation of the people for whom they were intended; and that, instead of being actuated by a projecting spirit, or attempting, from visionary speculations of remote utility, to produce any violent reformation, they confined themselves to such moderate improvements as, by deviating little from the former usage, were in some measure supported by experience, and coincided with the prevailing opinions of the country." [ib. 7].

The legislator who tries to do more than that,

"he who frames a political constitution upon a model of ideal perfection, and attempts to introduce it into any country, without consulting the inclinations of the inhabitants", he "is a most pernicious projector, who, instead of being applauded as a Lycurgus, ought to be chained and confined as a madman". [*Hist. View*, III, 329].

This "Great Man" theory is criticized not only as a theory of law but as a theory of social life in general, particularly in Millar's *Introduction to the Ranks*.

Law is, then, not an intended construction but the undesigned by-product of settlements of particular disputes. Only at a comparatively late stage do rational constructions play a role in systematizing, supplementing and, to some extent, changing the common law from views of "utility".⁵⁴

Section 9. Natural Justice at Work

On the background of the argument in the preceding eight Sections of the present Chapter it would seem obvious that the theory of natural justice which we met in Smith is taken over in all its essentials by Millar and Craig. We have the same idea of the relationship between justice and the other virtues and hence of the relationship between law and morality. For Millar and Craig, as for Smith and Hume, law is the kind of phenomenon which necessarily must

have a history and which can only be understood in its evolution out of natural justice. This means that all questions of justice and right can only be raised and settled with reference to the social context or situation. And finally, like Smith and, in his own way, Hume, the two later authors think that it is through the reactions of the impartial spectator that the individual questions of justice are decided by being referred to their context. Or, to put it differently, it is again the combination of universalizability and maximum compatibility of individual aims in the given situation which provides the criterion of natural justice. As we saw at the end of Section 4 above, this is exactly the way in which Craig approaches the question of what a good constitution is in the light of his theory of natural rights.

In spite of the evidence for a line of argument like the one in the present Chapter, Millar's theory has nearly exclusively impressed scholars and critics as an historical and, not least, sociological theory of law. There are, as we will see below, some good reasons for this, but if we want to get a comprehensive and consistent interpretation, which at the same time can show the line *from* Hume and Smith and the line *to* Craig, then the natural justice aspect has to be brought in. It has been stressed constantly in the preceding Sections where we from many different angles have seen the view explored that natural justice is the very framework of all social life and that all other institutions, government, laws, civil [or political] rights, etc., are nothing but means to serve and preserve this framework.

To illustrate this in a more concrete way and to further demonstrate that Millar and Craig were serious when they spoke of natural justice, I will in the present Section undertake a special analysis of what their theory had to say about property relations in contemporary Britain. These views are put forward in the *Letters of Sidney* and repeated in the *Elements of Political Science*, Book II, Chapter V.⁵⁵ As I have pointed out in Appendix B, it is impossible to decide whether Millar or Craig wrote the *Letters of Sidney*, but since they are based upon a theory of natural justice which is common to both it hardly matters for the sake of the present argument.

The *Letters of Sidney* are, as the subtitle tells us, "*on Inequality of Property*", and the first six *Letters*, which correspond to *Elements*, Book II, Ch. V, Sec. i, maintain that in Britain at the time this inequality is so excessive that it has had the most appalling effects on social life in a number of respects. It is completely undermining both the private and social morality of the very rich as well as the very poor and this evil spirit easily spreads to the whole community. It creates a corrupt atmosphere in which all public spirit and patriotism is spoilt. Furthermore, it is economically disastrous for, argues the author, very much in the vein of some modern economists,⁵⁶ economic growth is a matter of capital and capital accumulation is much impaired under conditions of extreme inequality of fortune. This part of the argument is summarised in the following way:

"I trust I have shown, that excessive inequality of property occasions misery both to the rich and to the poor; that it is subversive of morality, is the

bane of patriotism, the prolific mother of the most flagitious crimes, that it is extremely hurtful to agriculture, commerce, and population. It seems altogether impossible for the mind of man to conceive more numerous and more destructive evils proceeding from one source."⁵⁷

After this harsh criticism of the evils consequent upon excessive inequality, the next two letters make it clear that such criticism is not in any way implying a scheme for the levelling of property.⁵⁸ They, furthermore, go to some length to show that all the scaring examples from history which establishment "alarmists" refer to are completely out of place, for they are, in the view of the author, all of them concerned with equality of political and civil rights and not at all with property rights, which are natural rights. Whether this is true or not is, of course, questionable, but it is interesting to see the distinction between civil and natural rights, which Craig draws so clearly in the *Elements*, being put to good critical use.

Having cleared up this matter, the following letter, No. IX, [*Elements*, II, 209-215] goes on to state the central philosophical arguments. Justice and property are not rationally and deliberately constructed by men out of considerations of utility; and more particularly they are not the creatures of society.⁵⁹ Social organization and government, on the contrary, is nothing but a means to protect property, for property is one of the natural rights which are founded in the natural feelings of spectators.⁶⁰ Natural rights,

including property rights, arise spontaneously among men irrespective of their particular political organisation; they are temporally and logically prior to civil society; and, indeed, the main function of civil society is to guard those rights. On this central issue Millar-Craig again find it appropriate to invoke the authority of Hume:

"the ingenious writer, who has said that the whole apparatus of our Government is merely intended to support the twelve judges, has only erred by going a little too far." [*Sidney*, p.46].⁶¹

After showing how rules of justice emerge spontaneously, and only later gain strength through consideration of their utility,⁶² the author goes on to apply them to the problem at hand, the excessive inequality of property. He takes the first step in the last section of letter No. IX⁶³ by making the negative point that levelling as such is completely ruled out. He does so in the following strong words:

"All schemes of levelling are evidently destructive of the Right of Property: they disappoint the reasonable expectations of the present proprietors; they reduce men educated in affluence to a comparative indigence; they deprive many of the fruits of their own labour, ingenuity, and economy; they are in direct opposition to those rules and principles of morality which have been confirmed by the unanimous assent of mankind, and which are absolutely necessary to the enjoyment of security, order, and happiness. Such an equalization differs, in no respect, from

robbery, except in being the act of a greater number of criminals, in causing greater immediate misery, and in producing more destructive effects. Nor can any Government, or any majority of a nation, have any right to produce such equality, to attack that property and those rights which society was instituted to defend. If such an attempt should be made, it would amount to a dissolution of the social combination; the Government would no longer possess any claim to obedience; and the *Minority* would be justified in defending, by force, those rights which the Majority had attacked. But all dangers of this sort, I trust, are entirely chimerical; a system of levelling being as repugnant to the feelings of the human breast, and to all the rules of morality and justice which regulate the conduct of mankind, as it is contrary to the experience of all ages and nations." [Sidney, 47-48].

Having decided the matter of right with regard to levelling, the following letter, No. X,⁶⁴ argues that levelling is not only unjust but also useless. It does not pay economically and it cannot function because inequality springs up again immediately.

This brings us to the conclusion that extreme inequality is bad but levelling is worse. The former has disastrous consequences, but the latter not only has as bad or worse consequences, it is also fundamentally unjust. If we want to do something about the existing great inequality, it has to be done within the framework of natural

justice and that clearly excludes the levelling of property.⁶⁵ The author thinks that this aim can be achieved through the following three measures, which would all discourage extreme accumulations of wealth without infringing upon property rights. 1] A change in the inheritance laws such that primogeniture is dissolved and all children inherit equally. 2] A change in the inheritance laws such that only testaments for a limited part of a man's property are enforced. 3] The distribution of the tax burden according to a somewhat progressive scale.⁶⁶ I am not going to pursue the author's arguments for those proposals in any detail, but I want to point out the structure of the argument. It is in all three cases that, as natural justice is not transgressed, the measures are by definition just, and as they are desirable for other reasons, namely considerations of utility, they ought to be carried through.

As to inheritance, he argues, in letter No. XI, that the impartial spectator will approve that all those closest to a deceased person succeed to his property and it is, therefore, part of natural justice. This again means that it cannot rightfully be changed by statute, for only what is introduced by statute can be changed by statute.⁶⁷ He then goes on to show, in letter No. XII, that deviations from this natural justice in inheritance were in fact deliberately introduced by men and they ought accordingly to be abolished. Primogeniture was thus introduced in rude and violent times when it was important to have an agreed leader in war but, as this consideration of expediency does not apply to modern times, there is so much more reason for returning to natural justice, i.e. to equal inheritance

for all the children, instead of limiting the succession to the eldest son.

As to testaments [letters XIII and XIV],⁶⁸ he argues that they do not have any foundation at all in human nature, i.e. in a spectator situation. They are thus purely a matter of statutes, which means a matter of expediency, and as we want to discourage large concentrations of wealth, only a certain part of a man's property should be allowed to be disposed of through testaments.⁶⁹

Finally, as to taxation, the author's point is that if the tax burden is divided equally between all members of the society, it means that the poor are deprived of basic necessities, the better-off of conveniences, and the rich of luxuries. [Letter XV].⁷⁰ Accordingly taxation ought to be progressive. Presupposed in this argument is, of course, that taxation is a matter of statute.⁷¹

If we now take an overall view of the *Letters of Sidney*, we will see that their structure is this. For many reasons we are apprehensive about a particular feature of our social life, namely the extreme inequality of property, and we want to do something about it. But we are morally obliged to base our criticism of this situation, as well as our remedy for it, on natural justice. Both in order to find out what is natural justice in the case, and in order to apply this justice, we have to enquire into the history of the situation.

Like Hume and Smith before them, Millar and Craig are always insistent that justice is a purely negative virtue: the law of nature only tells us what not to do. What the *Letters of Sidney* make clear is

that, as long as we keep within this framework, our political actions can have all sorts of motives, but the range of politics is set by natural justice. Furthermore, the negative character of justice gives it its critical function. Whatever social institution we turn towards, we have to ask whether it is contrary to the law of nature and, if that is the case, we are morally obliged to abolish it.⁷² This is the great, fundamental principle which determines the rest of Millar's and Craig's politics. It is behind their criticism of such things as

"the game laws, ... and the laws relating to apprenticeships, to corporations, and to settlements, by which persons are prevented from changing their place of residence at pleasure, and from employing their labour and talents in the manner most beneficial to themselves." [*Elements*, I, 152-53].⁷³

It stretches to their active support for that great humanitarian cause, the abolishment of the slave trade, and it determines their views on the two great historical events of their time, the American and French revolutions. Their whole-hearted support of the former, as well as their very selective support of the latter spring from the same source, their view of natural justice.

Section 10. The Role of History: Millar

In a sense our central argument could be said to end with this demonstration of how natural justice, according to Millar and Craig, can be an active force in men's approach to politics. It would,

however, be a serious distortion of both Millar and Craig to let the argument stop here. They would appear as mere epigones of Smith who had nothing to say for themselves. Whereas this charge may not be quite unjustified in a broader historical perspective, changes are introduced which are of importance for our understanding of the fate of the theory of natural justice. The major theoretical changes were all due to Craig, as I will show below, but Millar is not without importance either. Millar simply changed the whole focus from jurisprudence in a philosophical sense to history and sociology of law. This is obviously true of his published works,⁷⁴ and it is largely true to his lectures as well. Although the latter do contain a good deal of philosophical and critical material, their whole approach to law is descriptive.

As we have seen at length in the present work the possibly most characteristic feature of the theory of natural law in Hume and Smith is the interconnexion between their descriptive and normative approaches to law. Millar himself does neither/^{sever}nor confuse this relationship, as we have seen above, but the fact that his interests overwhelmingly concentrate on the descriptive disciplines may well have contributed to such an effect on others. Hume and Smith were themselves more groping their way towards a new theory than stating it in a clear and finished form, as our constant reformulations have shown.

Millar's historical and sociological approach has led to near unanimity amongst modern scholars⁷⁵ that his real achievement is a materialist, or economic interpretation of history similar to the

one ascribed to Smith and obviously irreconcilable with an idea of natural justice like the one presented above. As in the case of Smith this suggested interpretation is so vague that it is next to impossible to say exactly what it is, but since Millar's theory in all essentials is identical with Smith's,⁷⁶ the same arguments apply here as in connection with Smith.⁷⁷ Like Smith Millar uses as his explanatory unit the typified reactions of individuals to their situation, and like Smith he thinks that mankind's situation can be divided into four broad types, the four stages of social development. Likewise in agreement with Smith, Millar saw in each of these stages a multiplicity of elements which would influence the individuals living through that stage:

"the fertility or barrenness of the soil, the nature of its productions, the species of labour requisite for procuring subsistence, the number of individuals collected together in one community, their proficiency in arts, the advantages which they enjoy for entering into mutual transactions, and for maintaining an intimate correspondence." [*Ranks*, p.2].

As in Smith, the economic elements dominate and are necessary for any social change, but they are hardly ever alone and sufficient. It thus seems a strange sort of historical materialist who would maintain that,

"the *ultimate*⁷⁸ cause of this great phenomenon [the French Revolution] appears to be no other, than the general diffusion of knowledge, and the progress of science and philosophy." [*Crito*, p.3 *my italics*].

The main obstacle to the materialist interpretation of Millar is, however, the presence of a clear idea of natural justice. This would be unintelligible unless history for Millar, as for Smith, was an open-ended process with a plurality of factors at play, amongst which men's application of the rules of natural justice could be one. Millar's own will and ability to apply these rules in a given situation has been demonstrated above.

Finally, it should not be forgotten that, irrespective of his actual practice in the published works, Millar's *intentions* with the discipline of jurisprudence were exactly the same as were Smith's. Like Smith, he saw comparative, including historical, studies of law like his own as being in direct continuation of the work of Grotius and the later natural law theoreticians.⁷⁹ But in his view these philosophers did not achieve their goal, a universal system of law, because they were too dependent upon Roman law and because they did not clearly distinguish between morality and law, but got their system infiltrated by the unclarity of casuistry.⁸⁰ In Millar's view it was Montesquieu, Kames, and Smith who improved this situation by their comparative studies of law.⁸¹ But the interesting thing is that the sociological and historical knowledge is by no means the only thing we get out of such studies. We,

"obtain, at the same time, satisfactory evidence of the *uniformity of those internal principles* which are productive of such various and apparently inconsistent operations." [*Hist. View*, IV, 285, my italics].

It is only when we understand "the uniformity of those internal principles" that we can see "that there is any thing stable or precise in the moral sentiments of mankind" ['Life', xxvi].

This is "that standard of perfection which nature holds up to the speculative mind" and which makes us "find no difficulty in conceiving" improvements in the practical system of law in any country.⁸² In other words, the new study of law, which Millar sees himself as continuing, has the same *ideal* as had the natural law systems of Grotius and others, namely that of,

"delivering a system of law, free from the defects which occur in every practical establishment, and which might correspond in some measure, with our views of absolute perfection". [*Hist. View*, IV, 282].

Craig sums up Millar's procedure nicely in the following words:

"Mr. Millar, in his Lectures, ... began by investigating the origin and foundation of each right in the natural principles of justice; and afterwards traced its progress through the different conditions of mankind; marking such deviations from the general rule as the known circumstances of particular nations might be expected to occasion, and accounting ... for those diversities in laws, which must otherwise have appeared irreconcilable with the idea that there is any thing stable or precise in the moral sentiments of mankind". ['Life', xxvi].

Section 11. The Role of History: Craig

In *intention* Millar was clearly the heir to Adam Smith's now fashionable sociology and "economic" history, but also to his strangely integrated discipline of jurisprudence, or philosophy of law. In *practice*, however, and particularly in his published work, he buried the latter under the sheer bulk of the former and did it so effectively that it has hardly ever been caught sight of since Craig.

Craig saw it, took it up, and changed it. In his treatment of law in chapters I and II of Book II of the *Elements* he has taken a clear stand on the integration of the history of law with the theory of natural justice. He virtually denies history any role. This is obviously a very dramatic break with the whole tradition of natural justice which he otherwise takes over in so many respects. But before we go into the details of this significant development it is, I think, of quite some interest to get a little insight into the background to it. This may be provided by a passage towards the end of the 'Life' where Craig describes the influence of the French Revolution and the following wars on the public opinion in Britain in general, and on Millar and his work on the history of the British constitution in particular:⁸³

"For several years, the public attention had been so fully engrossed by the important events passing on the theatre of Europe, that there remained little curiosity respecting those steps by which the British Constitution had reached its present state. *The minds of men were*

more intent on discovering what is best, than what has actually taken place, and perhaps even the author [Millar] was, for some time, less interested in his usual speculations, while every appearance indicated that a new era had commenced, and that the future Governments of Europe were likely to have little dependence on former institutions". ['Life', cxxx; my italics].

This passage is interesting in several respects. Firstly, Craig seems to indicate that even Millar came in doubt about the value of history for theoretical purposes. Only through a close analysis of the lecture notes from the last decade of Millar's life might we have a chance of throwing some light on the extent to which this is true. Secondly, this passage in a nutshell shows what the ideology of the French Revolution did to the old Scottish moral philosophy. It led it to separate and choose between the two questions of "what is best" and of "what has actually taken place", whereas the tradition which we have tried to describe here was a developing attempt to connect them. Thirdly, the passage shows how perceptive Craig could be and it shows where he found the starting point for those reflections which led him to discard the theoretical role of history.

Craig did reflect on this very clearly. Already early in the *Elements*, while treating 'Of the Rights of Government', he confronts the question as clearly as one could wish. The context is well-known to us; although men universally have certain natural rights, it is only too clear that governments more often than not infringe upon them far beyond what can be justified. He then goes on:

"The view of a state of society, so different from that which the constitution of man had pointed out as just, naturally suggests two questions, *which, though quite distinct, have frequently been confounded*. 1st. From what circumstances have the governments of the world arisen? 2nd. On what principles can the powers exercised by government be justified? The first is entirely a question of historical research, and the answer will be different in regard to the government of every separate people. ... The investigation of the actual origin of governments, while it thus opens a field of incalculable extent, is but casually connected with the science of politics: but before enquiring into the constitution and duties of government, it is obviously necessary to ascertain on what principles those powers which distinguish a political state, from that which has been denominated a state of nature, can be justified". [*Elements*, I, 94-95, my italics].

This is a truly astonishing piece of writing from the heir apparent to the John Millar tradition and it indicates that he may after all be a bit more than the faithfully plagiarizing disciple. The passage epitomizes a number of things. Firstly, it draws the distinction between history and abstract science clearly and distinctly and, like the last quoted passage from the 'Life', it draws it as a distinction between the *quaestio de facto* and the *quaestio de jure*. Secondly, when one remembers that it was Smith's and Millar's constant ambition

to deal with "history and theory", it is difficult not to see them as at least part of the target when Craig says that the "two questions ..., though quite distinct, have frequently been confounded". More direct targets would, of course, be the Whig traditionalists and Burke. Thirdly, it is the writing-off of the *quaestio de facto* as "entirely a question of historical research" which allows him to see that the other question, the *quaestio de jure*, really is the backbone of an entirely separate discipline, "the science of politics", a discipline which the world since came to hear more about. It's this insight that is the background to the surprising title of Craig's work.⁸⁴

Section 12. Against Law: Civil Law

This development is reflected in an unusual way in Craig's treatment of law which we must now turn to. He divides law into civil and criminal [chapters I and II of Book II]. The basis for this distinction is a distinction between two kinds of injuries; those injuries which can be "repaired" so that the injured person is put back into his position before the injury are the objects of civil law, whereas injuries which cannot be "repaired" but have to be punished through the infliction of harm are the objects of criminal law [*Elements*, I, 275].

In the chapter on civil law Craig first gives a short sketch of how law develops out of spectator situations, as mentioned earlier, and of how such consuetudinary law is later supplemented with statute law. He then goes on to argue that both in the case of common law and in the case of statute law the decision of court cases must be to a very

large extent hinge on the discretion of the judge. In the former case because no two cases are completely alike and hence there is no such thing as a real precedent; in the latter case because all general rules must be interpreted in order to cover any particular case, and "this want of precision [is] inherent in the nature of general rules" [*Elements*, I, 284]. To those difficulties of the law comes the difficulty of establishing the facts of a case, which will also add to the discretionary powers of judges. [ib. 284-85].

Altogether the existing systems of law are such that they inevitably invest the administrators of justice with wide discretion and hence exposes them to corruption. [ib. 285-86]. A well-known remedy to this is to multiply the judges, but it never really works [286-89]. The second common remedy is jury trial of the facts combined with judge-administration of the law. This is, however, rather impossible in practice, for the distinction between the facts and the law in a given case is hardly ever clear so, either the laymen on the jury will meddle in abstract principles of law which they have no chances of understanding, or they will be led by the judge, in which case the purpose of jury trial is defeated. [*Elements*, I, 289-98]. This brings Craig to his surprising suggestion,

"to enquire, whether it be really necessary to establish any system of abstract law, and to decide disputes on other grounds than the merits of each case, and the unalterable dictates of natural justice." [*Elements*, I, 298].

This is what he sets about to do in the following Section II of the Chapter.

Abstract law, as it is known, is uncertain because it requires so much discretion. Also it is so extremely complex and this is the reason why the administration of it becomes so complex and impenetrable; it increases the number of court cases and their duration far beyond what strict justice requires, and it makes the administration of justice so expensive that the protection by courts very often is an illusion. Furthermore, once an abstract law system is in existence, the continuation and perfection of it becomes an object in itself, as mentioned already in the previous Section.⁸⁵ This means that the overall usefulness of the system or the general rule becomes the central thing, for which the merits of the particular case may have to be sacrificed; and this in the end amounts to substituting power for justice:

"The very essence of law⁸⁶ is to look to the utility of the rule in future cases, rather than to equity in the present instance; to do, in short, what may be a direct act of injustice to one individual, if, in consequence of it, the system will be rendered more perfect, and future disputes or injustice prevented. But the principle on which such decisions are given is by no means unobjectionable. The community may have the power of sacrificing the property of an individual to the good of the whole, but they have no such right". [*Elements*, I, 307-308].

Apart from showing a firm stand against utilitarianism proper, this passage is of interest because it shows that Craig has abandoned the idea, which is so prominent in both Hume, Smith, and Millar, that

justice and public utility will coincide. More particularly it shows that the trend, which Millar saw in modern, commercial society, towards evaluating all institutions more and more in terms of their public utility, for Craig was something to be resisted, not just noticed. Finally, Craig makes the point that systematic law must always trail behind social life, for the latter consists of particular cases and the former can only begin to accommodate them when they have occurred [ib. 309-11]. As long as we are brought up under abstract systems of law, "our moral feelings are perverted", and we mistake legality for justice. "No longer solicitous to act justly, we are satisfied if we have acted legally [ib. 312].

Craig's solution is simple and radical: "to throw away [our] enormous folios, and refer to the judge within the breast"! [ib. 302]. With references to and quotations from Harrington he urges that we discard all formal law and that means, of course, all the law which is *de facto* given, which has been shaped by history in the ways described by Millar. He sees the law which tradition hands down to us as the main hindrance for justice, and it is thus hardly to be wondered at that he wants to separate the study of the two in the manner described below.

Instead of formal law we should take up a system of pure natural justice, which in practice means that all cases should be decided completely by jury. When there is no formal law, all discretion, and hence all uncertainty, will disappear, for natural justice is completely clear and, "No man ... can be at a loss to discover the light in which his actions will appear to an impartial spectator: nor will it be difficult for him to anticipate, with regard to his

claims against others, the award which a jury, looking only to justice in the present dispute, will pronounce." [ib. 300]. The impartial spectators on a jury will have nothing else to look after than strict justice; there is no formal system or general rule to take care of; and they are laymen, not professionals with professional interests. Also all complexity will disappear; hence only cases of genuine injustice would be raised and they would be simple, short, and cheap. There would be no danger that equity might be sacrificed in the interest of utility; and all decisions would be taken from the viewpoint of contemporary spectators, not based on out-dated rules. Craig sums up this back-to-nature message in the following forceful terms:

"Justice is not, as systems of law would pretend, an abstract science, requiring a long and difficult education. It is implanted in the human breast; and, born with man, would grow up with him to maturity, were it not choaked by noxious weeds. Destroy those notions, of law as opposed equity, and justice will spontaneously arise and flourish. The moment that the real nature of the transaction is ascertained, the feelings of mankind suggest the proper award. Let us then cease to accumulate statutes, precedents, and authorities; discarding all consideration of hypothetical cases, let us attend to the exact merits of those disputes or misunderstandings submitted to our judgement; and let us do justice between man and man."

[*Elements*, I, 311-12].

However, not everything in society can be decided by "the natural feelings of justice". Although it is a matter of such natural feelings that, say, the *de facto* possession of a piece of land for a certain period is taken to establish property right in this land, there is nothing 'natural' about how long the period should be. Equally, although it is absolutely necessary for the existence of a society that the citizens contribute to the administration etc., of it, there is nothing 'natural' about exactly how much. In cases like these the natural feelings have to be supplemented by reasoning about what is the most expedient in a given society. However,

"views of general utility, depending on information, reasoning, and experience, must be more various than the natural feelings of justice." [ib. 313].

Human reasoning is fickle and uncertain, and there is no guarantee that men will ever agree. Accordingly someone's view of what is expedient will have to prevail - those of the government, for lack of better. Such statute laws

"are reducible to two great classes. 1st, Those which, though consonant to the dictates of equity, are intended to introduce a greater uniformity into practice than could arise from natural feelings; and, secondly, those which, founded on views of expediency, introduce duties or rights, unsupported by the law of nature, though not necessarily in opposition to it." [Elements, I, 315].

To add precision to the natural feelings of justice and to enforce

those joint actions which are necessary to keep a society going, for those purposes,

"as conscience is silent, and opinions will vary, statutes must be promulgated, declaring explicitly what is considered as necessary for the good of the nation" [ib. 322].

Statute law derives its extent from what is comprised in its linguistic formulation. It has to be formulated and to be intelligible to ordinary jury folk. It derives its authority from power and its *raison d'être* from expediency.

Such, then, are Craig's astonishing ideas of civil law, which could almost be called an anti-law philosophy. As we will see below, he carries the same ideas over into the field of criminal law. Before doing so he does, however, devote the first Section of the Chapter 'Of the Administration of Criminal Law' to the fundamental question 'Of the Right of Punishment'.

Section 13. Punishment

Rousseau's suggestion that the right of punishment springs out of the social contract, i.e. rests on implied consent, is briefly rejected for the simple reason that the ideas of contract and implied consent to not make sense, as shown earlier. The justifications of punishment which Craig really wants to discuss are, however; 1] the reform of the offender, 2] the satisfaction of mankind's resentment, 3] the general good.

Craig sets out in typical Smith-Millar fashion, remarking that the reform of the offender obviously cannot have been the *original* motive for punishment. In the primitive ages of mankind the motive could only be revenge. It is only when life becomes more civilized that reform *can* come in as a motive. Craig soon turns his back on natural history, saying that reform *ought* not be a motive for punishment, for what is good for a man is completely individual and his own responsibility. We do not *know* what is good for others and no one would go along with forcing any imagined "good" upon another. In short, it is paternalism:

"To employ coercion with a view solely to reformation is to decide for another where happiness is to be found, to force him to adopt our ideas, and to compel him to prefer our judgement to his own." [*Elements*, I, 329].

Those difficulties in justifying punishment by the reform of the offender led William Godwin to completely discard punishment as a suitable measure and to propose to replace it by education of offenders. However,

"Perhaps a task more difficult could not be assigned to man. It would require the most rare conjunction of prudence, forbearance, penetration, reason, and eloquence" [ib. 332].

Punishment must thus have other *foundations*, but this should not prevent us from having reform in mind in the way in which we inflict punishment.

The right of punishment does, as we already know, arise from the natural feeling of resentment at injury, when this feeling is tempered

in such a way that the uninvolved spectators will go along with it. This feeling is universal to mankind and cuts across all cultural and social boundaries; if it is not distorted, it is our natural measure of punishment. [ib. 333-35].⁸⁷ The logic behind punishment is harm for harm and it is only when the two are seen to be connected that we count one as punishment of the other. An indirect confirmation that man does think retributively about punishment is to be found in the fact that we tend to project those natural sentiments beyond the present life into a future state where it would have no meaning to see punishment as an attempt at reform or the like. [ib. 336-37].⁸⁸ Resistance to this foundation of punishment is normally due to the fact that resentment in itself is an unpleasant feeling and, if we do not see it in its context as a reaction to injury, this may dangerously impair our willingness to inflict just punishment. [ib. 338-40].

This retributive view of punishment obviously presupposes that responsibility, in one sense or another, can be attributed to man. This idea has been criticized by Godwin from the usual deterministic standpoint that it is unfounded to see man's will as somehow an ultimate cause of actions; the will is itself caused, the motives are caused, etc. So to hold a man responsible by punishing him is entirely unjustified since he is nothing but the medium for part of a long chain of causes. This criticism is, in Craig's view, misconceived. Although all man's actions may well be determined by prior causes, it is a fact that it is beyond human knowledge to find more than some of the more obvious and immediate of those causes; so the only way in which we can,

and in fact do, influence the behaviour of others is by reacting to it. In the case of injury the reaction is resentment and consequent punishment.⁸⁹

Godwin raises the further criticism that it is impossible to establish guilt because the mind of another person is unknowable [ib. 342-43]. Craig's answer is that if we took this seriously, then virtually no human action would be possible since they nearly all relate or refer to others as *persons*. [ib. 343-44].

It may seem strange to attribute both the argument from determinism and the argument from our ignorance of other minds to the same person, but I do not propose to go into the tangled question of whether Craig is faithful in his interpretation of Godwin. Nor do I think that we will be able to throw much light on Craig's own doctrines by exploring his general relationship to Godwin. There are obvious similarities in their idea of doing away with professional lawyers and judges and substitute them with lay juries, but the differences are much deeper and more interesting. One is a radical utilitarian who wants to substitute educational treatment for punishment. The other upholds a peculiar doctrine of natural justice and believes firmly in retributive punishment.

One of the main justifications of the right of government, according to Craig, is that it is needed to provide internal security. The only way it can do so is by a strict administration of justice. This cannot be substituted by any direct power over the citizens, and the reason Craig gives is again the limitations of human knowledge. It is

simply not possible to know enough about the minds of any number of people to guide them directly. The only thing the government can and, of course, ought to do is to influence the citizens indirectly, or negatively, through punishment of injustice. [ib. 346-48]. This argument from ignorance is obviously the general form of the old liberal argument for a free market economy: no one has enough knowledge to direct the economic activity of men and hence we will have to leave it to the individual - within the boundaries of natural justice. This is again closely connected with the view which we have seen recurring in Craig and which I in connection with Smith called negative utilitarianism,⁹⁰ namely that whereas we do not have much idea of what is good for other men and of where we should lead them, we do have pretty clear ideas of what is damaging to them and hence of what we should forbid them to do to each other.

The *usefulness* of the administration of punishment to provide public security has, however, by many, including Bentham, been taken as the ultimate justification of punishment, according to Craig. This is in his view the most dangerous of all, for in doing away with natural justice and substituting public utility, we open the door for the use of punishment for all sorts of purposes:

"The moment we depart from the criterion of justice furnished by the natural and universal sentiments of mankind, we no longer have any known or determinate standard; we shall be guided by our fears, by our speculations, or, what is worst of all, by the exclusive interests of those ranks which are above

temptation to the crime, and most likely to be injured by its prevalence: statute will be added to statute, punishment raised upon punishment, till at last our criminal law will become the disgrace of humanity."
[ib. 349].

In short, this would be to substitute power for justice. From this point Craig goes on to formulate some of the classic criticisms of the utilitarian justification of punishment and some of his formulations here are of such clarity that one would have thought they were part of the academic harvest rather than of the political-philosophical seed of the battle of utilitarianism. Utilitarianism would make the distinction between guilt and innocence meaningless:

"The instant we depart from the plain undeviating course of retributive justice, and award punishments merely for the sake of example, or increase the severity of law from speculations respecting public expediency, that moment the distinction between guilt and innocence is at an end, and we must view the legal penalties, not as justly attached to the commission of crimes, but as the means of producing advantages to many, at the expense of a few." [ib. 352-53].

When that distinction is obliterated we may as well punish the innocent as the guilty. This can, however, not be right, for,

"while we applaud the punishment of the guilty, our minds would revolt from that of the innocent, however conducive it might be to the happiness of millions.

There must, therefore, be some difference between the two cases; we must intend something more than the public good, when we punish a crime; there must be something connecting in our minds the penalty with the offence, independently of that benefit to society, which, in particular circumstances, may possibly be promoted by injustice." [ib. 351-352].

Also, if we disconnect guilt and punishment, the proportionality between crime and punishment will be lost. This will easily lead to too severe punishment, and men are then likely to lose respect for the law and to follow their feelings of natural justice in seeing the punishment as the crime. [ib. 353-362].

Craig clearly sees that a utilitarian theory of law amounts to a form of legal positivism which sets up a barrier between the law and morality, whereas for him law, as we have seen, is a part, albeit a very special part, of morality. Such a barrier will have pretty disastrous effects:

"Actions being judged by a criterion altogether different from their real merits, the genuine moral feelings are silenced by pleas of legality, or stifled amidst false, though plausible, pretences of the public good."

"An action is being avoided, not because it is morally wrong, but because it is legally punishable; another is performed, not because it is strictly just, but because a penalty has been annexed to its omission." [*Elements*, I, 363 & 362].

Utility is, then, not the justification of punishment, the natural feelings of justice are. The only place Craig sees for considerations of expediency in punishment is that they can strengthen our determination to punish in spite of sudden pity for the offender, [another detail taken over from Smith] and that they can guide us as to the *means* of punishment [ib. 350-51].

Section 14. Against Law: Criminal Law

Having established the justification of punishment, Craig in the following Section produces the same argument concerning criminal law which he had given for civil law, namely that all formal or abstract rules should be abolished and the law simply consist in the natural reaction of the lay spectators on a jury. The jury should, of course, decide law as well as fact in any given case, and they should fix the level of punishment. Such a system would dispense with the promulgation of the law in the form of general rules. Nothing can be added to or subtracted from natural justice as it exists in the natural feelings of mankind, and general rules are useless because they cannot catch the details of particular cases. In fact, they will just lead to the need for review bodies which are bound to be a source of corruption. Also punishment of crime is a highly individual matter which cannot be administered by means of general rules, but only by living spectators. So the message is the same as in the case of civil law: to abolish all formal law. The need for it is much greater in criminal than in

civil law, for the former is easier to exploit by the rulers and ruling classes for suppression.

Like civil law, criminal law has in certain respects to be supplemented by statutes enacted by the legislature out of considerations of utility. This is the topic for the third and final Section of Chapter II. The best method of punishing is a matter of trial and error, which has to be conducted by a continuing body in order that one error may benefit the following trial. Only a legislature, which should be alert to the progress in "moral and political knowledge", can fill this role. Furthermore, there will always be a need for laws of a merely administrative nature and, since jurors may have difficulty understanding such expediency laws, the punishment for transgressing them ought to be fixed by fiat of the legislature. In such cases observance of the law is a matter of mere legality, not morality. Finally, what counts as crimes against the government must to a large extent be laid down by statute. But in all those cases it is clearly implied that the statutes are checked by natural justice and that they in the end only exist for the sake of justice and its administration.

This, then, is Craig's radical proposal for how to return to natural justice: to abolish all formal law in as far as it is at all possible. It may not be immediately clear how this view is to be brought into line with the view, which we have seen Craig taking over from Hume and Smith, that the spectators' natural reactions to injustice are so clear and certain that they are spontaneously rule-forming. The question is,

where exactly does the line between rules of natural justice and formal laws go? Although Craig does not face the question in this way, it seems fairly clear from the foregoing what his answer must be. The rules of formal law are first of all declared law, or positive law, but, apart from that, also consuetudinary law, in so far as it exists in the form of precedents which are the object of study by a special profession. Or in other words, formal law seems to be a creature of positive institutions in *certain* of its aspects. In contrast, the rules of natural justice seem to be nothing but spontaneous formations which only exist as part of popular morality. Certain things around them, such as the specific *way* in which they are enforced, are matters of positive institution; but in themselves they are nothing but an off-spin of inter-human relationships. So in a way his proposal could be said to be that certain *institutions* should be abolished, namely all the institutions upholding formal law, with the exceptions given above.⁹¹

EPILOGUE

In seeing a significant connexion in social thinking in general, and in legal thinking in particular, from Hume through Smith to Millar and Craig I have not found much support in modern scholarship. The differences have been more in the limelight. If we, however, go back to one of those near-contemporaries for whom this tradition was a heritage to be accepted or rejected, we will get the indications of some understanding of this. I am thinking of James Mill who had been sitting at the feet of Dugald Stewart in Edinburgh. In the early years of the new century while he was trying to find his own philosophical standpoint, and before he identified it with that of Bentham, he reviewed the posthumous editions of Millar's *Historical View* and the *Ranks*, both of which Craig was responsible for.¹

In the first of these reviews Mill takes Hume as the starting point for the line of thinking which had led to the *Historical View*². But at the same time as he sees this ancestry he also seems to perceive an important difference. Whereas Hume had given a "complete union of history and philosophy"³, it was in Mill's view necessary to separate the two into the narration of facts, "which is more properly the business of history", and the formulation of general, explanatory laws which can be used in history and which are the subject of philosophy. As Mill reads Millar he was trying to

make exactly this separation:

"It is in this light that [Millar] ... seems to have reviewed this subject".⁴

While the distinction between the particular statements which make up history and the universal statements which make up the theoretical sciences is both valid and useful, it would seem fairly clear that none of the four thinkers dealt with here were confused on this point; for all of them history provided illustrations of the general principles contained in the developing science of human nature. Mill's insistence on the distinction may, however, very well be a sign that he is losing sight of the integration which there *also* is between history and theory in the tradition we are dealing with. One of the main points in the theory of human nature was to show that the institutional manifestations of human activity are of such a kind that they necessarily must have a history.

If one overlooks this integration one is likely also to overlook that human evaluations in general, and particularly human morality, can not be understood just on the background of the universal features of human nature described by a theoretical science; they have to be seen in their context, in their situation, as well. The situation must, however, be particular and some of its features must be unique. Accordingly it can only be accounted for by history, whose task it is to make the particular and the unique intelligible.

Any mistakes in this connection are most likely to show themselves in the appreciation of the theory of justice in our four thinkers, since this is the place where the theory of contextual evaluation is most well developed. This presumption is, indeed, confirmed by Mill. If we turn to his review of the *Ranks*⁵, we will find that it is only concerned with Craig's 'Life of Millar', which prefaces the main text, since,

"In other respects [the edition] differs not from those which have preceded it".⁶

Mill's attitude to Craig is quite hostile and at one point he complains that,

"We are at a loss ... after all that Mr. Craig has said, to understand the peculiar view of jurisprudence which Millar took. The foundation on which he rested our moral judgements is pretty distinctly explained, and is sufficiently absurd. We are sorry that we cannot form a more distinct conception of his speculations on the rest of this subject, which we have no doubt were of a very different importance."⁷

Although this is mainly a complaint about Craig's performance it does reflect in a very interesting way on Mill himself, for it is just not correct that Craig's description of Millar's 'peculiar view of jurisprudence' is less distinct than that of the foundation of our moral judgements. Whereas the latter topic, however, is so well-known from Smith that Mill immediately can take a standpoint on it, the former is felt to be 'peculiar' and impossible to form a 'distinct conception of'.

This must be some of the clearest evidence we can find that Hume, Smith and Millar never got the full message of their jurisprudence across even to their immediate posterity, and Craig's changes in the doctrine could only have the effect of obscuring it even more. Craig discarded the historical, and hence the broader social, aspects of the situations in which men, as spectators, decide questions of justice. In this respect he was in accord with the new century, for it came increasingly to neglect this basic idea that all human judgement must be undertaken, as well as understood, on the basis of an immense amount of background knowledge which inevitably has to be presupposed or taken for granted, and which only history can give some account of. Without this idea the theory of moral sentiments, as developed by Hume and Smith and conveyed by Millar, must disintegrate into three or four only vaguely related disciplines; history and social psychology of morality, and a curious blend of meta-ethics and normative ethics. This would nowhere be more evident than in the special area of morality dealt with by jurisprudence; and amongst its repercussions would be the formation of political economy and political science as independent disciplines.

Just as the impartial spectator must look rather naked and "sufficiently absurd" without the appropriate historical dressing, so the judgements and opinions of the day, without the impartial spectator behind them, must look rather like fashions: constantly changing. The latter has been the perspective from which the 20th century has seen the

Scottish speculations on law, as we have seen at some length in connection with both Smith and Millar. It is the sociology and the history of law and morality which impresses modern scholarship. The main point in the present work has been to restore some balance in this by introducing a third factor, the *critical* function of jurisprudence, to which both the history and the social psychology of law in a sense is subservient. Once we have got a clear view of this program it would seem to present a worthy challenge to bring it up to date and for someone to fulfil the old promise,

"in another discourse ... to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society".

A P P E N D I X A.

NATURAL OBLIGATION IN HUME

In Chapter II, Section 8, I have presented what I take to be Hume's theory of obligation, both as far as the obligation to natural and to the important artificial virtues is concerned. There are, however, a good deal of passages in the *Treatise* dealing with obligation which we have not accounted for and which seem somewhat puzzling. I am, of course, thinking of Hume's frequent use of "natural obligation".

In one of the central passages, which I have already quoted, he is clearly taking natural obligation to be our obligation to perform the natural virtues:

"where an action is not requir'd by any natural passion, it cannot be requir'd by any natural obligation; since it may be omitted without proving any defect or imperfection in the mind and temper, and consequently without any vice." (T. 518)

Here natural obligation is clearly taken to be contrasted with "artificial obligation" (an expression not used by Hume), in the sense of obligation to perform the artificial virtues. But elsewhere Hume takes natural obligation to be identical with interested motivation: "The *natural* obligation to justice, viz. interest ...". (T. 498); "interest is the *first* [i.e. original or natural] obligation to the performance of promises". (T. 523) In his later discussions of the relation between the obligation of promises and the obligation of allegiance he also frequently talks of "the *natural* obligations of interest". (T. 545; 544, 546 etc.) Clearly natural obligation here means something different from what it means in the first quoted sense. When we behave justly and perform promises out of *self-interest* there is obviously nothing

involved about us hating ourselves for the lack of a natural motive and thus a natural virtue. Natural obligation in the sense of interested motivation is closely akin to Hobbes's idea of natural obligation:¹ to have an obligation is to be obliged, i.e. urged by natural (self-interested) passions to do something, without the interference of anything moral. Natural obligation must, therefore here be taken in opposition, not to "*artificial* obligation", but to *moral* obligation.

We can, however, not complain about this confusing use of the word "natural", for Hume has already early in Book III gone through five different senses of the word, namely as opposed to the miraculous, the unusual, the artificial, the civil, and the moral; and he concludes by warning us: "The opposition will always discover the sense, in which it ['natural'] is taken"! (T. 474-75)

The concept of natural obligation in the sense of interested motivation is also necessary if we are to understand Hume's idea that moral obligation varies proportionally with the natural obligation. This idea comes up in various places, but particularly clearly in the Section 'Of the laws of nations' in the *Treatise*. He there points out that men in fact more easily go along with transgressions of the natural laws between states and their sovereigns than between private men. (T. 568) He ascribes this to the fact that whereas justice between states arises out of self-interest on the part of the states, just as is the case with individual men, and whereas this likewise gives rise to a moral obligation, this self-interest will often not be so strong and, indeed, necessary as between individuals and, consequently the moral obligation must be weaker as well:

"'tho' the intercourse of different states be advantageous, and even sometimes necessary, yet it is not so necessary nor advantageous as that among individuals, without which 'tis utterly impossible for human nature ever to subsist. Since, therefore, the *natural* obligation to justice, among different states, is not so strong as among individuals, the *moral* obligation, which arises from it, must partake of its weakness". (T. 569)

The interest involved consists of a regard to the utility of a certain kind of actions (and their motives), and it is through sympathy with this utility that our moral evaluations and obligations arise, as we have seen. So when the utility varies, so does the evaluations and the obligations: "the *moral obligation* holds proportion with the *usefulness*." (E. 206)

Hume states the same idea when he treats of the virtues of chastity and allegiance to governments, but he there also points out that the direct connection between utility and obligation may be off-set by the influence of general rules. When people have become used to a pattern of behaviour in accordance with certain rules, they do not automatically and immediately change that behaviour when the rules prove not to be useful any longer. Thus women still stick to the rules of chastity when they are past the child-bearing age, though the rules then no longer serve their specific purpose; (T. 572-573. E. 207-208) and men do not instantly rebel against a government as soon as it does not quite serve their interests. (T. 551-553) Thus one natural principle, the adherence to general rules, overrules another, the motivating force of utility, in certain cases. In both the cases mentioned he points out that this is as well, for in general the long-term effect of

adherence to the general rules is more useful than it would be to follow the ideas of utility at any given moment. (T. 552-553, 572-573;

E. 207-208) In other words, an *unintended*, but useful result is created by thwarting motives which *intended* useful results.

APPENDIX B

THE WORKS OF MILLAR AND CRAIG

John Millar only published two works under his own name, *The Origin of the Distinction of Ranks: or, An Inquiry Into the Circumstances which give rise to Influence and Authority, in the Different Members of Society*¹, and *An Historical View of the English Government from the Settlement of the Saxons in Britain to the Revolution in 1688. To which are Subjoined Some Dissertations Connected with the History of the Government from the Revolution to the Present Time.*² Although both of these works contain material which is relevant to our inquiry, neither of them is in any way primarily jurisprudential. Apart from these Millar's works are anonymous. According to his first biographer, John Craig, he published "one or two anonymous pamphlets, on such political questions as he thought important to the public welfare, and a few articles in the *Analytical Review*."³ There is fairly general agreement that one of these pamphlets is the *Letters of Crito, on the Causes, Objects, and Consequences of the Present War.*⁴ It has been speculated that Millar is also the author of the *Letters of Sidney, on Inequality of Property. To which is added, A Treatise of the Effects of War on Commercial Prosperity.*⁵ As to the reviews in the *Analytical Review*, mentioned by Craig, it has so far been impossible to establish which ones are to be ascribed to Millar.⁶ Of these works only the *Letters of Sidney* are of direct interest to us, but then they are, as we will see, of the very highest importance.

Is this pamphlet really Millar's? William C. Lehmann thought that this is "a strong probability"⁷ because of the close similarity between

the *Letters* and Millar's known views and because there "is ... nothing that speaks clearly against it."⁸ Hans Medick has recently gone much further and claimed that he could now give "den sicheren Nachweis der Autorschaft Millars ..., der bisher in der Sekundärliteratur nicht erbracht werden konnte".⁹ Although I am of the opinion that it is quite possible that Millar is the author of the *Letters of Sidney*, I can certainly not agree that Medick has *proved* this. Indeed, his "proof" throws some additional doubt over Millar's authorship. Medick's argument is that certain of the most central passages in the *Letters* reappear verbatim in John Craig's *Elements of Political Science*¹⁰; but since this work in Medick's opinion largely is a paraphrase of Millar's unpublished Lectures on the Science of Government which Craig had listened to as a student¹¹, he concludes that also the *Letters* must be Millar's. There would seem to be at least one other obvious possibility, that Craig himself wrote the *Letters* and later incorporated them in his major work! To Lehmann's rhetorical question about

"Who but a man like Millar would be quoting Harrington in 1796; and who else in Scotland would be likely to know of a law on testaments just passed in France, of which he had not yet seen 'the specific regulations'!"¹²

we could fairly confidently answer that a student, a relative and good friend, and an intellectual ally, in short, a man like Craig would be quite likely to do so.¹³ So while Millar may be a good guess about the authorship of *Sidney*, this is by no means proved; and there is at least one obvious and quite likely alternative author, John Craig.

Where does this place Millar in our account? Well, apart from the

controversial *Sidney* and apart from what can be extracted from the published works mentioned above, there are his lectures. While Millar's own lecture-notes have not been preserved,¹⁴ a large number of students' notes of his lectures are still in existence, and some of them are of such a quality that they give us a fairly good idea of Millar's lectures.¹⁵ These lecture notes are of extraordinary importance, first of all because they point backwards to Adam Smith, but also because they point forward to John Craig. It is clear that Hans Medick is quite right when he sees Millar's Lectures on Government as the closest we come to the work on the "Theory and History of Law and Government" which Smith never got quite ready for publication;¹⁶ and I would add that there is much material of equal importance in some of the other of Millar's lecture courses, especially the Lectures on Civil Law. Furthermore, it is evident that there is a close relationship between the lectures on Government and Craig's big three volume work on the *Elements of Political Science* which was published some thirteen years after Millar's death. Medick even maintains that this work

"grossteils auf einer Plagiiierung des Millarschen Manuskripts der 'Lectures on the Science of Government' beruht".¹⁷

This does, however, seem to me both inaccurate and unjust. It is inaccurate in that while it is true that some parts of Craig's work are dependent upon Millar's Lectures on Government, other parts are equally close to some of his other lectures; the influence of Millar's Lectures on Civil Law is e.g. clearly to be seen. Medick's allegation of plagiarism is unjust as long as it is not qualified half-way out of existence. It should be explained that Craig's arrangement of the material in the *Elements* is completely new; and it should further be

explained that this new arrangement is rather significant, for it reflects a substantial change in the political and social thinking in general, and the jurisprudence in particular, which we find unfolding from Hume through Smith to Millar. As shown in Chapter IV above, history is deprived of any theoretical role and left out of the account; and together with it the idea of unintended consequences also becomes insignificant, at least as far as the theory of law is concerned. Once this has been substantiated, it will be clear that Craig's *Elements of Political Science* assumes a much more interesting place in the history of liberalism from Hume to the Philosophical Radicals, and it seems to me unwise to write the work off as mere plagiarism until this has been attempted.

Although I cannot accept the charge of plagiarism, and although I think that something interesting and new happens in Craig, my main theme has been that there is a strong continuity in the idea of natural justice. In order to get the details of this continuity we would have had to make use of all the existing notes from Millar's lectures referred to above. When I say "all", I mean roughly that. As I mentioned, it is not just a matter of close similarities between Craig's *Elements* and Millar's Lectures on Government, but also Millar's other lecture courses and, particularly, the Lectures on Civil Law. However, as I explained in Chapter I such a comparison would be impossible within the framework of the present thesis.

A P P E N D I X C.

MILLAR: "IDEOLOGE DES KLEINEN BÜRGERTUMS"?

Hans Medick and Annette Leppert-Fögen have presented us with the undoubtedly shrewdest and most sophisticated commentary on ^{and} criticism of John Millar.¹ It is therefore a pleasure to disagree with it in most of its aspects. In order to bring out the issues as clearly as possible I will state the position of our authors in a number of theses and afterwards answer them one by one.

1. *thesis*: Millar is fundamentally to be seen as the ideologist "des kleinen Bürgertums", of the middling ranks.

2. *thesis*: This ideological function is made clear by a number of significant inconsistencies in his doctrines, for these inconsistencies are the simple reflections of the contradictory *situation* of the minor bourgeoisie. The difficulties in Millar's theory

"sind ... aus der spezifischen *in sich widersprüchlichen Situation* einer Klasse abzuleiten, die einerseits die warenproduzierende Gesellschaft, in der "every man thus lives by exchanging, or becomes in some measure a merchant", von den Begrenzungen eines Subsystems befreien wollte, so dass schliesslich "the society itself grows to be what is properly a commercial society",² während sie auf der anderen Seite die *kapitalistischen Konsequenzen* des ubiquitären Tauschs scheute." (27-28)³

The intellectual inconsistencies are, therefore, inevitable and necessary, (p. 27).

3. *thesis*: The most fundamental inconsistency is to be found in Millar's theory of labour. When he analyses the process by which feudal society develops into modern commercial society, he uses labour (namely the labour of the middling ranks) as the foundation for property,⁴ and as the precondition for the evolution of the political autonomy and liberty of the individual. (pp. 28-30) - This theory falls into contradiction when Millar analyses the fully developed commercial society, for here the basic thing, labour, becomes a commodity in itself:

"Widersprüchlich muss diese Theorie in dem Augenblick werden, wo die in Geschichtsphilosophie und politischer Theorie unterstellte ökonomische Autonomie der Warenproduzenten dadurch ins Schwanken gerät, dass deren Arbeitskraft selber zur Ware wird, sie selber - und nicht mehr nur, wie es sich in der Begründung der "commercial society" ausnimmt, die von ihr produzierten Überschüsse über den Eigenverbrauch - Gegenstand des Tausches ist und der Nichtbesitz geradezu die Voraussetzung dieses Tausches bildet." (p. 30)

4. *thesis*: This is linked with a difficulty in the theory of capital. When Millar deals with pre-commercial society, he says that "capital is composed of what is saved from the produce which [has] ... not been consumed by individuals";⁵ but when he comes to modern society this idea is completely transformed and capital is now an independent "Produktionsfaktor" along with the two natural ones, land and labour. As such it is an independent source of *new* property, namely profit, which is thus not based on the owner's own labour. (pp. 30-31)

5. *thesis*: This leads to a split in Millar's class-theory. For he sees clearly that as long as we are in pre-commercial society there must be two broad classes, those with, and those without property; and he sees that these two classes must be *opposed* to each other as rulers and ruled. In modern society, however, there must be three classes, corresponding to the three means of production. But as Millar here suddenly alleges that capital *helps* the labouring classes in maintaining themselves, he is also led to maintain that this class-structure does not lead to any clear and stabile power-structure, i.e. to any antagonism. Millar is simply blind to the fact that the new capital has its foundation in exploitation. (p. 31-32)

6. *thesis*: Historically the middle class of small producers is the link between the feudal and the full-blown capitalist society, but it is different from both and it is antagonistic to both. (Cf. 2. thesis on the contradictory situation of the class.) Millar wants to turn the condition of this class into the permanent condition for society in general. His blindness to the true character of capitalism means, however, that he only attacks to one side, as it were, namely feudal, and feudal looking, impediments to his Utopia. (p.32)

7. *thesis*: This leads him in the *Letters of Sidney* to adopt the contradictory standpoint of first arguing clearly against inequality of property and then defending private property even more strongly against all levelling. (pp. 32-33)

8. *thesis*: The latter is even done with such excessive zeal that he would maintain private property in the interest of a minority against the will of a majority of the people. (33-34)

9. *thesis*: This contradiction between criticism of inequality and condemnation of equalization is impossible to resolve, but it can be enlighteningly explained. It is an expression of the ideology of "reasonable economy" of the small producers which, on the one hand, requires the existence of private property but, on the other hand, must exclude excessive possessions as leading to - bad economy. This is the "kleinbürgerliche Horizont", the spoken and unspoken assumptions "des kleinbürgerlichen Ökonomen: and, in the end, "des kleinbürgerlichen Moralisten Millar". (pp. 34-38)

This interpretation seems to fit like a glove. It is just a question whether the hand is Millar's or, for that matter, Craig's. I think not. I will start my answers with the third thesis and move on from that. At the end I will take up theses 1 and 2.

Adv. thesis 3: This starts from a clear mistake. Millar does *not* adopt Locke's labour theory of property. He is quite as clear as Smith that property has its origins in the spectator situation and he repeats this nearly *ad nauseam*. One of the clearest passages is in the ninth of the *Letters of Sidney* and it is of such importance that it is worth quoting at length:

"The simplest view we can take of this subject [the source of the right of property], is to consider the feelings which would naturally arise in the breast of a spectator, while one man endeavoured to dispossess another of any external object already under his natural power. To him, the interests of the two individuals would be equally important; and as he could have no sympathy with the preference which the aggressor evidently

gave to his own happiness over that of the other, he would disapprove of it as improper. By being in possession of the subject in dispute, one of the parties had formed a natural and reasonable expectation of enjoying it; and the attempt of the other threatened to disappoint this just expectation; to render his situation in some respects worse than it was before; to diminish his enjoyment, and to do him positive injury. The spectator would readily sympathise with the resentment which such conduct was fitted to excite, and would readily assist him in recovering that subject, of which he had been unjustly bereaved. The other person, besides being actuated by self-preference, which none could approve, could suffer no real loss by the refusal of the object he desired; his situation would be exactly the same as before he made the demand; he would neither be deprived of any enjoyment, nor of any reasonable expectation of enjoyment; and any resentment, which, in such circumstances, he might express, would appear to others highly absurd. Where the difference of sympathetic feelings was so strong, the spectators would never hesitate with respect to the propriety of their interference; and, thus, an idea of property would arise from the mere circumstance of actual possession. Accordingly, occupancy, the mere laying hold of a subject, has, by all writers on natural law, been accounted the chief mode of beginning a right of property; and, in many rude nations, this right is conceived to subsist no longer than the actual possession continues."⁶

But when mankind has got beyond the "rude" stage and has taken to agriculture, then,

"after a person has long cultivated the same field, his possession becomes gradually more and more complete ... and when by his industry and labour he has increased the value of the subject, he *seems* justly entitled, not only to the immediate crop that is raised, but to all the future advantages arising from the melioration of the soil." (*Ranks*, p. 158).⁷

This last quotation indicates exactly what it is Millar does with Locke's labour theory of property: he twists it into a supporting argument for his own spectator theory. The idea is simply that nothing heightens a man's expectation of having his *de facto* possessions at his command more than his actually conferring some work on it; and as any impartial spectator fully goes along with this his right is so much more firmly recognized. This again is spelled out with all the clarity that could be wished for in the ninth of the *Letters of Sidney*:

Various circumstances concur in strengthening and confirming this right. Few acquisitions are made without the employment of some labour or ingenuity, and no association can be stronger than between a man and the produce of his own labour. His exertion is altogether voluntary; and, while it marks, in the strongest manner, his desire of possessing the subject, it often adds greatly to its value, and sometimes is the sole source of its being in a situation capable of being used. A man, by building a house, evinces his intention of possessing it; and by his labour puts materials, formerly of little value, into such a form as may afford him conveniency and comfort; should

another person, who had given no assistance to the work, endeavour to dispossess him, the difference between their rights would be obvious to the most careless observer.

[footnote: "See Locke on Civil Government, Book II, Chap. V."]" (Sidney, 45).⁸

Furthermore, it is not the case, as maintained in thesis 3, that labour as such is the precondition for the political autonomy and liberty of the individual members of the emerging middle class. Rather it is labour done in *new circumstances*, viz. in a market situation. It is the *market* that makes people free individuals, whatever they have to offer on the market. This applies to labour services as well as goods, but of course the latter is the most frequent and obvious in the early stages of the evolution of the market system. Accordingly Millar says that, "the labouring parts of the inhabitants" "often find it more profitable to work at their own charges" etc.⁹

The whole point in a theory like the Smith-Millar-Craig one is that with the development of the market its liberating or independence-making effects spread downwards to the very lowest orders of the people. It is, therefore, creating a situation in which even the poorest do not need to sell themselves any longer (as Medick and Leppert-Fögen maintain, p.30), but only their services. Of course this may lead to new social problems, especially educational ones, but that is after all not any contradiction, but a practical problem.

Millar sees the development of Britain "since the Reign of William III" as leading in exactly this direction. In the important Essay No. III in *Hist. View*, IV, he shows how capitalism in commerce and farming

in this period increased freedom and independence in general and how it created the *chances* of obtaining them for so to speak all. The consequence of such liberty is inevitably inequality, but the important thing is that this is not a final and monopolized inequality. Over a few generations the "manning" of the various ranks will change in a system of liberty and it is to achieve this that laws of inheritance, testaments, and entails should be reformed.¹⁰

Adv. thesis 4: Similarly there is no contradiction in Millar's theory of capital. What is just savings in pre-modern society can only become capital, in the modern sense of an independent means of production, when a market has developed. The criticism that profit cannot be property in the proper sense because it is not based on the owner's labour is refuted once we remember that Millar does *not* embrace the labour theory of property (see my answer to thesis 3 above).

Adv. thesis 5: Millar maintains that the two broad classes of pre-commercial society are opposed to each other as rulers and ruled, because there is no market system through which the property of the former can be circulated and thus benefit others than themselves. The only two ways property can be used or circulated are either as gifts, which creates dependents, or by means of violence, which leads the propertied classes to use power and thus also creates dependents. It is this situation which is changed by the market, if it is not prevented by continued enforcement of feudal laws. Savings turned into capital by the market can be *spent* and they can *change hands*. The three classes of modern society are accordingly not classes in the same absolute sense as the two classes in earlier periods, for their "manning" is continually

changing. In fact this creates a tendency towards a society where the class-concept is nearly inapplicable, society being in that respect atomized into individuals. Although property always will have a strong influence on power, this will in such a situation be very much loosened.

Adv. thesis 6: This thesis rests on a particularly nice mistake. It brings out clearly that our authors have misunderstood the real basis and starting-point for Millar's various criticisms, i.e. natural law in his and Smith's sense. It is because feudal institutions are in conflict with *this* that Millar criticizes them. When he does not criticize capitalism as such, it is obviously not because of any particular "class-interest", but because he conceived the society of small and middle-sized producers as a form of capitalism; the liberal form of capitalism where no monopoly or monopoly-creating laws (inheritance, entail) are enforced and where there, outside the market, is room for mending the various social defects which must arise.

Adv. thesis 7: There is therefore no contradiction in his criticizing inequality of property and at the same time rejecting levelling. Both the then existing excessive inequality and any future levelling of property would *in the same manner* transgress natural justice and liberty, they are both illegitimate interferences.¹¹

Adv. thesis 8: It is, therefore, *not* because of anybody's interest, but because of natural justice, that property has to be defended against attacks wherever they come from.

Adv. thesis 9: There is, as shown, no contradiction to explain. As to Millar's "kleinbürgerliche Horizont" and his zeal for "reasonable

economy", this is not an absolute and unchecked ideology but a set of moral, social, and economic ideals which are tried out against the superior ideal of justice and liberty. In so far as they pass this test they can be allowed.

Adv. thesis 2: A contradiction is a logical relation between propositions. What a contradiction between classes, or a contradictory situation, is, I do not know; but, even if there were such a thing, our authors still owe us an explanation of how exactly *intellectual* contradictions are "abzuleiten", to be derived, from it. Anyway, we have seen that the particular intellectual contradictions they find in Millar are imaginary.

Adv. thesis 1: Whether Millar is the ideologist of any class or not is not particularly interesting as long as it is not shown exactly what this would explain. Moreover, even *if* Millar is the ideologist of a class this is not the *reason* why he holds the views he does.

A P P E N D I X D.

TENSIONS IN MILLAR?

According to Louis Schneider¹ Millar's thought is not beset by quite so many contradictions as Medick and Leppert-Fögen credit him with; it is rather characterized by a number of suggestive and significant unclari-
ties. Schneider's main claim is that Millar on the one hand presents what is normally known as/^alaissez-faire theory of society, but on the other hand he engages in various social criticisms which are in "tension" with this theory:

"Men's actions, ... often have unintended beneficent consequences, and it is these, rather than maleficent ones, that need primary emphasis. Excellence in institutions is characteristically achieved when men are *not* planning for it. Old institutions are likely to incorporate wisdom. ... Deliberate social planning is likely to have pernicious results. "System" is particularly to be regarded with wariness. ... The above strain or tendency in his thought may be said to suggest a "model" of society whereby it works well if left essentially untouched and paradoxically flourishes when men do not concern themselves about its welfare. The model is plainly "low" on rationality. Men need not (and do not) reflect much on social objects. Unintended consequences of action are likely to provide necessary social forms and changes. It has already been amply indicated that projection, speculation, and system are to be looked at askance. The model is accordingly also "high" on laissez faire. But all this ... is in tension with other very significant aspects of Millar's

thought. In particular, the low-rationality feature is in conflict with Millar's animadversions on the Catholic Church, which, in his view, simply as a matter of fact, does not exhibit low rationality. And the laissez faire feature quite fails to fall into easy congruity with the criticisms he makes of the society and culture of his day and place.²

This understanding of Millar's social and political theory hits a number of points correctly, but it is faulty in various respects. Firstly, it is true that for Millar all human actions have unintended consequences. Secondly, it is correct that this shows that there are limits to men's rational and deliberate planning of society. Thirdly, it gives tradition a certain importance. It does, however, *not* mean that any institution is wise or good, *because* it is old and traditional. It is so because it fulfills certain criteria (namely, the criteria provided by natural justice and liberty).

Furthermore, the fact that there are limits to what men can achieve by rational action in society does not mean, according to logic and according to Millar, that *nothing* can be achieved that way. Indeed, Millar-Craig's philosophy is an attempt to *delineate* the areas where we should definitely not achieve anything but disaster if we began to plan according to some preconceived plan. Those are the areas determined by justice and liberty; but outside those areas there is no reason whatsoever why we should not try to plan³ although we, of course, do not have any guarantee of success (our actions will always have other effects than those aimed at). Thus, although we must leave the market alone, there is every reason to help those who occasionally fare

badly in it. (Schneider's first specific complaint, pp. 2093-2094). Moreover to think the market system on the whole beneficial, and its alternatives any way bad, obviously does not compel one to like all its effects, like e.g. the "commercialization of life". (Schneider's second complaint, pp. 2094-2095).⁴

Although we have an obligation to leave property rights untouched, we have no obligation to keep up old statutes for inheritance and entail, on the contrary. Likewise as to the system of government (Schneider's third complaint, pp. 2095-2096): it is only to be judged in terms of expediency, i.e. in terms of its ability to protect justice and liberty. By this standard a Parliamentary reform was called for in the late 18th Century, according to Millar and Craig.

Finally, Schneider's criticisms reach their climax in connection with the grounds for political obligation in Millar (pp. 2096-2097). On the one hand Millar presents the British Constitution as the outcome of a long, slow growth which no human could have planned or envisaged. On the other hand he claims the right for modern man to evaluate it rationally.

Here we must first remember that Millar never lets tradition imply obligation. In so far he is therefore perfectly entitled to insist on an independent criterion of evaluation. Secondly, though Millar is not specific on this, it ought to be clear that although men's social knowledge of necessity is limited, this does not free them from judging as best they can. Thirdly, it is amply clear that Millar's criticism of excessive, or constructive, rationalism in social matters always

concerns large-scale reconstructions, whereas what he himself suggests is small-scale, piece-meal amendments (of Parliamentary elections, of inheritance laws, etc.). As for Millar's positive attitude to one of the largest scaled reconstructions ever, the French Revolution, we must first of all remember that he had so many reservations about it that all he really endorsed was the early attempt to imitate the British Constitution, and, secondly, that any liberal, in the sense of Hume, Smith, and Millar, would allow that situations can arise where so fundamental values are infringed upon that there is no other recourse than violence. (*Letters of Crato*, e.g. letter no. 2.)

A P P E N D I X E.

CRAIG ON POLITICAL POWER

As argued in the text,¹ Craig's ideas about political power are mainly of interest because he has such a clear view of the relationship between power and right, seeing the former, and thus the state, as a means to protect the latter. His discussion of the *distribution* of political power (*Elements*, Book I, Ch. II) is, however, in itself of quite some interest. He begins by pointing out that any form of political power is tantamount to political inequality, so the whole argument concerns what kind of political inequality is least inexpedient. The first question is whether the inequality should be permanent or temporary. The former could neither be justified by any inequality in natural rights, for on that point we are completely equal, nor by its usefulness, for it can always turn out to be necessary to get rid of the rulers. Permanency will often have a tendency to corrupt the rulers and take away all public spirit and regard for individual rights since all competition is ruled out. These arguments, of course, apply whether rulers are elected or born to permanent power; the latter will just add arbitrariness to the selection of the kind of persons who will rule. Political power ought thus not to be permanently with anyone in particular and the whole question becomes one of how widely it should rotate. It is in this context that Craig puts forward the extremely interesting argument² that "Man is formed by the circumstances in which he is placed" (*Elements*, I, 173) and hence, to let him be involved in the political life of a society in an active role will educate him and "form" him to be a genuine citizen; and, obviously, the more this can

be extended, the better. This general argument must, of course, be adjusted to the individual situation, and if there e.g. is a section of the population which is so poor that its votes could be bought by the rich or those in power (as was the case in contemporary Britain, according to Craig), then they should not be enfranchised.³ This qualification should, however, be very low and it should further be said in its defence that it would be a general rule which would not be directed against particular individuals, but against a group whose membership would be continuously changing.⁴ In this context it should be remarked that Craig strongly criticizes the idea that society at any time is divided into (two) fixed, and opposed, classes. "On the contrary, society consists of insensible gradations, rising from the lowest to the highest station, etc." (*Elements*, I, 198).⁵

In the light of this Craig goes on to argue for some Parliamentary reform in Britain, including not only extended suffrage to the lower house, but also the replacement of the House of Lords by the kind of senate which he also finds desirable in principle, an independently elected one with full powers alongside those of the lower house (but with some extra qualifications on candidates and electors). He also argues the case for retaining the monarchy.

There are, however, only two more arguments in the Chapter which are of interest for us. The first is fairly straightforward. Craig argues that, although he supports the separation of the legislative and the executive powers for a number of reasons, he cannot agree with Montesquieu that this separation is essential for the protection of individual liberty. The independence of the judicial power is the only

real necessity here. This argument is, of course, a clear consequence of the idea that rights are not protected by formal law, but by the spectators on a jury.⁶

The second argument to be mentioned is of interest because it in a nutshell shows the difficulties in a purely naturalistic theory of politics. It occurs in the first half of Section II of the Chapter we are concerned with. Having argued in the first Section that political inequality is basically a creature of expediency which only resides temporarily in any person and that apart from that men are equal, Craig now points out that after all men are, as a matter of fact, not equal. They are different in intellectual power, in wealth, and in birth, and whether or not we like it, such things create respect and thus power. This is in Craig's eyes a confusion of *power* with *influence*. Influence is a purely subjective phenomenon which is dependent upon the nature and state of the minds of those who are being influenced, but power rests on an enforceable obligation to obey. If power were to rest on influence, it would be a government of force. On reading this Hume's words about all power resting on opinion come to mind and one is led to ask, how can there within a sentimentalist framework, like the Hume-Smith-Millar-Craig one, be a distinction between an "enforceable obligation" and a subjective "influence"? The answer is obviously that what carries weight with the impartial spectator is an enforceable obligation and, as we know, the spectator is the embodiment of the dual criteria of maximum compatibility and universalizability. Between them they should be able to satisfy *both* the naturalist's wish for explanation *and* the moralist's demand for justification.

CHAPTER I. THE PROBLEM

1. This has been demonstrated as clearly as one could want by Duncan Forbes in his *Hume's Philosophical Politics*.
2. I am here thinking of the work of F.A. von Hayek. See especially *The Constitution of Liberty* and *Law, Legislation, and Liberty*, I-II.
3. This claim will be appropriately modified for individual elements of the tradition as the account goes along.
4. The modern discussion between Professor Hart and Lord Devlin about the relationship between morality and law is obviously very closely related to our discussion and it might have furnished an alternative formulation of our starting-point.
5. I am, of course, thinking of Professor ^TC.D. Campbell's *Adam Smith's Science of Morals*.
6. I have in mind the work of such scholars as Pascal, Meek, Skinner, e.a., which will be dealt with below.
7. See Medick & Leppert-Fögen, 'Frühe Sozialwissenschaft als Ideologie des kleinen Bürgertums: John Millar of Glasgow, 1735-1801'. The arguments of Schneider are structurally similar, although they are without most of the ideological lace work: 'Tension in the Thought of John Millar'.

8. *Remarks on Some Fundamental Doctrines in Political Economy*;
cf. Schumpeter, *History of Economic Analysis*, p. 600, note 25.
9. Except for a few footnotes in Medick, *Naturzustand und
Naturgeschichte der bürgerlichen Gesellschaft*, and in Medick &
Leppert-Fögen, *op. cit.*, which present him as a mere plagiarist
of John Millar.
10. See Lehmann, *John Millar of Glasgow, 1735-1801*, pp. 57ff and
407ff; same, 'John Millar, Professor of Civil Law at Glasgow
(1761-1801)'; same, 'Some Observations on the Law Lectures of
Professor Millar at the University of Glasgow (1761-1801)';
Medick, *op. cit.*, pp. 185ff; and Medick & Leppert-Fögen, *op.
cit.*

CHAPTER II. HUME'S THEORY OF JUSTICE

1. *Letters*, I. p. 32; and cf. T. 620-621.
2. *Letters*, I, p. 33; and cf. T. 621.
3. See especially:
Cumming, *Human Nature and History*, II, Chapter 13, esp. pp. 170ff.
Capaldi, *David Hume, The Newtonian Philosopher*, pp. 179-87.
King, 'The Place of the Language of Morals in Hume's Second
Enquiry'.
4. Cumming, *op.cit.*

5. Cumming, *op.cit.*, esp. pp. 172-74.
6. *Enquiry*, 219-220, the note.
7. The following short sketch of Hume's moral theory does, needless to say, not pretend to any completeness nor to any originality. Its only purpose is to set the scene for Hume's theory of justice. I owe much in this introduction to Professor P.S. Ardal's interpretation in his *Passion and Value in Hume's Treatise*; cf. also his Introduction and Notes to his edition of *Treatise*, Books II and III.
8. See Ardal's treatment of sympathy in chs. 3 and 6 of his book, mentioned in the previous note.
9. This idea permeates large parts of the *Treatise*, and it is difficult to single out any passage in particular. But the whole passage T. 584-87 must be one of the nicest. Also its "building [which] seems clumsy and tottering to the eye" (T. 586) provides an interesting reference-through-contrast to one of the early treatments of sympathy, the house with "the little room lost in the stairs, antichambers and passages"! (T. 363f.).
10. Again there is an absolute abundance of clear and quotable passages all through the *Treatise* to illustrate this, and again I will refer especially to Book III, Part iii, Sect. 1 (T. 580-84).

11. Hume gives this division in the *Treatise* on pp. 589-90. It is not necessary for my purposes to argue that sympathy is involved in our evaluation of all four kinds of qualities. But see Ardal, *op.cit.*, pp. 152-56.
12. *Treatise*, Book III, Part ii, Sect. 1, 'Justice, whether a natural or artificial virtue?'
13. All words marked * in quotations from the *Treatise* are inserted in the text (or somehow altered) from the list of Hume's handwritten marginal notes to the 3rd Book of the *Treatise*, published by R.W. Connon in his article, 'Some MS Corrections by Hume in the Third Volume of his *Treatise of Human Nature*', *Long Room*, No. 11, 1975, pp. 14-22.
14. K. Haakonssen, 'Hume's Social Explanations: The Case of Justice'.
15. See Duncan Forbes's treatment of this in the first two chapters of his *Hume's Philosophical Politics*.
16. In *Treatise*, p. 493, Hume says that the state of nature can be very useful and a legitimate *methodological* device, enabling one to treat of the emotional side of human nature in abstraction from the "understanding", i.e. social restraint (a point which incidentally shows his social conception of reason).

17. It is in connection with Hume's account of the origin of justice that R.D. Cumming (see note 3 above) sees a difference between the *Treatise* and the *Enquiry*: In the *Treatise* justice is mainly seen to alleviate the miseries of mankind; in the *Enquiry* it is more regarded as an instrument that creates "abundance". But this does not seem to be very persuasive, for just as Hume in the *Enquiry* points out how by "art, labour, and industry" in society we can create our enjoyments in "great abundance" (E. 188); so he in the *Treatise* points out, not only that it is "by society all his [man's] infirmities are compensated", but also that "tho' in that situation [society] his wants multiply every moment upon him, yet his abilities are still more augmented, and leave him in every respect more satisfied and happy, than 'tis possible for him, in his savage and solitary condition, ever to become." (T. 485). And Hume then goes on to point out the arrangement which really makes society advantageous: the division of labour. On the other hand, Hume does also in the *Enquiry* say that "few enjoyments are given us from the open and liberal hand of nature" etc. (E. 188). In both works justice thus has a backward looking as well as a forward looking aspect, which is hardly surprising since the two aspects are complementary. And I fail to see any difference in the stress put on them in the two works.
18. Concerning Hume's theory of the calm passions, see Ardal, *op.cit.*, ch. 5; in this context especially, pp. 104-106.

19. The treatment of the matter on p. 498 is at least as ambiguous.
I am glad to discover that Prof. Ardal in his paper to the 1976 Edinburgh Hume Conference takes much the same line as I concerning the conventional institution of justice. See 'Convention and Value', forthcoming in the Conference Proceedings. I am grateful to Prof. Ardal for letting me consult his paper before publication.
20. I take it as self-evident that Hume is talking of the extension of justice to more and more people, not the extension of the concept of justice to new areas, like e.g. contracts, or the extension of, say, the concept of property from cattle to land. There is no indication that anything like the latter was in his mind in the paragraphs of the *Treatise* with which I am dealing here.
21. On the low level of rationality, see also e.g. T. 492 and 526.
22. The points about the artificiality of justice in this quotation are going to be treated of below. Here I only quote the passage at length for the sake of comprehensibility.
23. 'Hobbesian' on the traditional reading of Hobbes.
24. See his criticisms of such moral and legal positivism: T. 500, 521, 578-79; E. 214.
25. I am indebted to Professor Leon Pompa for a discussion of the negative character of this doctrine.

26. Hayek, 'Dr. Bernard Mandeville', and 'The Legal and Political Philosophy of David Hume'.

27. We still have not seen how justice becomes obligatory.

28. See Sections 9 and 10 of the present Chapter; Chapter III, Sections 14-16; Chapter IV, Sections 10 and 11, and the Epilogue.

29. This seems to me the most fitting label for Hume's position.
 For the message of his discussion of determinism seems to be distinctly methodological, more than it is metaphysical, namely: don't be an indeterminist, for that is to abdicate the very hope of finding an explanation by means of causation, whereas determinism is a way of keeping the hope up.

30. Hume goes on to oppose "natural" to "miraculous", to the "rare and unusual", to "artificial", to "civil", and to "moral" (474-75); and the first three comparisons reappear in the *Enquiry*, pp.307-08, the note.

31. *Letters*, I, p. 33. This was not the last time Hume had reason to be annoyed that people misunderstood him on this point. When he came to write his own "reference" for the Edinburgh chair, he had to do it in the form of an anonymous defence of the *Treatise*. One of the last points he makes is this:
 "When the Author [i.e. Hume himself] asserts that Justice is an *artificial* not a *natural Virtue*, he seems sensible that he employed Words that admit of an invidious Construction; and therefore makes

use of all proper Expedients, by *Definitions* and *Explanations*, to prevent it. But of these his Accuser [identity not established] takes no Notice. By the *natural Virtues* he plainly understands *Compassion* and *Generosity*, and such as we are immediately carried to by a *natural Instinct*; and by the *artificial Virtues* he means *Justice*, *Loyalty*, and such as require, along with a *natural Instinct*, a certain Reflection on the general Interests of Human Society, and a Combination with others. In the same Sense, Sucking is an Action natural to Man, and Speech is artificial. But what is there in this Doctrine that can be supposed in the least pernicious? Has he not expressly asserted, that Justice, in another Sense of the Word, is so natural to Man, that no Society of Men, and even no individual Member of any Society, was ever entirely devoid of all sense of it?" (*A Letter from a Gentleman to His Friend in Edinburgh*, pp. 30-31).

32. For good discussions of this tradition and its relevance to social and political philosophy, see Hayek, *Law, Legislation, and Liberty*, I (esp. pp. 20-21), as well as the literature referred to there (pp. 150-51), particularly Heinemann, *Nomos und Physis*, and Popper, *The Open Society and Its Enemies*, Chap. 5.
33. As Professor D.D. Raphael has suggested in his 'Obligations and Rights in Hobbes'.
34. It is undoubtedly this last circumstance which leads Hayek to say that Hume actually did revise the traditional distinction (*Law, Legislation, and Liberty*, I, p. 20).

35. See Section 4 above.
36. See Section 4 above.
37. Hume also makes the point that the necessary subordination in society requires inequality (E. 194).
38. As Professor Ardal rightly points out, this is in a way an anticipation of J.L. Austin's view, "that 'I promise' is a performance, and not a statement about a mental act." Ardal's note 39 to his edition of *Treatise*, Books II and III, p. 347. Cf. Ardal, 'And That's a Promise'.
39. When Hume deals with obligation in the Section on promises in the *Treatise* he says explicitly that the reasoning is the same as for "justice in general" (T. 518).
40. See above, Section 2.
41. See above, Section 2.
42. On this point, see Ardal's Introduction to his edition of *Treatise*, Books II and III, p. 28.
43. This is of course the main theme of *A Dialogue*.
44. See Forbes's exposition of this in *Hume's Philosophical Politics*, Chap. 4.

45. See above, Section 2.
46. There is at least one other place where Hume hints that actions rather than motives can be the important thing in seeing how obligation comes about; see *Treatise*, p. 479 on obligation, where he ends, saying, "Actions are at first only consider'd as signs of motives: But 'tis usual, in this case, as in all others, to fix our attention on the signs, and neglect, in some measure, the thing signify'd".
47. Apart from obligation in the sense dealt with in this Section, Hume also frequently talks of "natural obligation". I discuss this in Appendix A.
48. *Hume's Philosophical Politics*, p. 61, note 1. Forbes is arguing with C.W. Hendel, *Studies in the Philosophy of David Hume*.
49. Forbes, *op. cit.*, p. 59, cf. pp. 63 and 64.
50. *Ib.*, pp. 26-27.
51. *Ib.*, p. 61, note 1.
52. *Ib.*, pp. 316f.
53. Cf. T.A. Roberts, *The Concept of Benevolence*, p. 103.

54. Hume does not, like Smith later, go into the development of the ideas of property in any systematic way, but he does at least once mention three of the famous four stages, 'Of Commerce', *Works*, III, p. 289.
55. It is difficult not to read this as a reference to the work of Bernard Mandeville.
56. Forbes, *op. cit.*, p. 119. The whole of his chap. 4, 'Social experience and the uniformity of human nature', is highly relevant for the points made here.
57. I owe this formulation in terms of the distinction between means-utility and end-utility to Hayek's *Law, Legislation, and Liberty*, II, pp. 17ff., and cf. the very interesting note 14, p. 155.
58. Pp. 16f.
59. Cf. my treatment of this above, Section 2.
60. Indeed one can say that this is the framework for Hume's whole theory of knowledge: each new element must fit into a context or be discarded.
61. I think that this argument can be extended to the whole of Hume's moral philosophy, but that is beyond my concerns here.

62. This latter point is rather important, for it suggests that not all the aims are equally important, equally close to human nature, and hence do not count the same in the test of maximization of compatibility of aims. Hume does not have any very specific theory on this point. But in suggesting the primacy of the prevention of the negative (injustice) over the promotion of positive valuations (see above, p. 76), he does approach a distinction between negative and positive values, of which the former are basic to the very existence and well-being of men and of the form, 'Not to be harmed' in some respect. This is taken up and worked out in some detail by Smith as part of the foundation for justice, and in this form I will characterize it as negative utilitarianism (see Chapter III, Section 11, and Chapter IV, Section 2 below).

63. See e.g.:

F.A. von Hayek, *Studies in Philosophy, Politics and Economics* pp. 99-107, 111, 160,

H.B. Acton, 'Prejudice', pp. 323-336,

F. Meinecke, *Die Entstehung des Historismus*, Part I, ch. vi,

G.H. Sabine, *A History of Political Thought*, ch. 19.

For excellent general treatments of Hume on the one hand, and on the other the Common Law and Whig traditions and Burke, see J.G.A. Pocock, 'Burke and the Ancient Constitution: A Problem in the History of Ideas', pp. 202-232; and Forbes, *op. cit.*, ch. 8, sec. ii.

For the Common Law tradition in particular, see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*.

CHAPTER III. SMITH'S THEORY OF JUSTICE

1. See e.g. his contrast between "Philosophers" and men in "common life", TMS, I, i, 3, §8.
2. As with Hume, the prime object of my discussion of Smith's general moral theory in this Chapter is to locate his theory of justice as precisely as possible.
3. Cf. Hume: "we blush for the conduct of those, who behave themselves foolishly before us; and that tho' they shew no sense of shame, nor seem in the least conscious of their folly." (T. 371). This is to Hume "a pretty remarkable phenomenon" (T. 370).
4. See J.R. Lindgren, *The Social Philosophy of Adam Smith*, pp. 21ff.
5. For a very strong expression of this need for identification, see TMS, VII, iii, 1, §4. The expressions are particularly strong here because Smith is trying to refute the suggestion that the act of sympathizing is in the end egoistic. For a similar, but more detached, refutation, see TMS, I, i, 2, §1, where he points to the spontaneity, as opposed to reflectiveness, of the pleasure of sympathy and pain of antipathy.

6. Cf. TMS, VI, ii, 1, §1: "Every man feels his own pleasures and his own pains more sensibly than those of other people. The former are the original sensations - the latter the reflected or sympathetic images of those sensations. The former may be said to be the substance - the latter the shadow."
7. It is particularly unfortunate that Lindgren chose to call this "aesthetic sympathy" since Smith's whole point is that no sympathy is involved. This leads to various curious mistakes in his treatment. See Lindgren, *op. cit.*, pp. 23-25.
8. While Smith was preparing a second edition of the TMS Hume sent him some criticism on this point. See Hume, *Letters*, I, pp. 311-14.
9. In editions 2-5 Smith continued the note with the following analogy: "Two sounds, I suppose, may, each of them taken singly, be austere, and yet, if they are perfect concords, the perception of their harmony and coincidence may be agreeable."
10. See my summary of Hume's argument above Chapter II, Section 2.
11. Dr. G.E. Davie has drawn my attention to this parallel and he tells me that Smith so far as the senses are concerned may be working on a suggestion in Condillac. We will return to the general view of knowledge indicated here. See Section 5 below.

12. Smith gives this explanation of propriety in contrasting it with our judgement of actions and their motives according to *merit*. We will deal with merit below since Smith's viewpoint is that merit in a sense is dependent upon or derivative from propriety.
13. There is a strong asymmetry between the positive case, praise, and the negative, blame, which is of great importance in Smith's theory and which we will return to below.
14. Cf. again Smith's account early in the TMS of how both the sentiment of the agent and of the spectator must be changed, in order to get "such a correspondence with one another as is sufficient for the harmony of society" (I, i, 4, §7).
15. See also all the other examples of adjustment in the following §§.
16. Cf. TMS, III, 3, §38: "The man within the breast, the abstract and ideal spectator of our sentiments and conduct, requires often to be awakened and put in mind of his duty, by the presence of the real spectator: and it is always from that spectator from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of self-command.

17. Again we find that Hume has anticipated this suggestion: "No quality of human nature is more remarkable, both in itself and in its consequences, than that propensity we have to sympathize with others, and to receive by communication their inclinations and sentiments, however different from, or contrary to our own. This is not only conspicuous in children, who implicitly embrace every opinion propos'd to them; but also in men of the greatest judgment and understanding, who find it very difficult to follow their own reason or inclination, in opposition to that of their friends and daily companions. To this principle we ought to ascribe the great uniformity we may observe in the humours and turn of thinking of those of the same nation; and 'tis much more probable, that this resemblance arises from sympathy, than from any influence of the soil and climate [cf. Montesquieu],..." (T. 316-17). It is this kind of mutual sympathy which for both Hume and Smith provides the possibility of *education*. From the hand of nature all men are basically alike but education can make them different for education consists in exposure to a variety of situations from which new lines of behaviour and thinking are picked up through mutual sympathy with other participants in the educational situation. This situational education explains the difference between the philosopher and the porter (W.o.N., I, ii, 4 and V, i, f, 51) as well as the differences between the Dutch, the English, and the Scots in connection with commerce (*Justice*, pp. 253ff.). And cf. Hume, 'Of the Original Contract', *Works* III, pp. 444-45. We will be returning to the whole problem of situationally determined selection of behaviour below in the final Section of this Chapter.

18. Cf. V, 1, §1.

19. Much stress has always been put upon Smith's indebtedness to ancient stoicism. This should not lead one to forget that scepticism was as much a part of the ancient legacy and both in Sextus and in Cicero Smith would find support for the view that men always have to accept the opinions and the behaviour of the society into which they happen to be born, the "acceptance" being a matter of sheer necessity. In contrast to the sceptics Smith did, however, not end the story there. For him man always has the possibility of developing standards above those of his society by means of which he can evaluate the social morality, but he can only do so piecemeal and with isolated parts of the given morality, while the rest necessarily has to be accepted for the time being.

20. This theme is frequently recurring in the TMS. Some of the more noteworthy "wonder and surprise" passages are the following:

I, i, 4, §3; I, i, 5, §§6-8; I, ii, i, §12; I, iii, 1, §13;
II, ii, 1, §6; IV, 2, §§8 & 11; VI, ii, 2, §2; VI, iii,
esp. §§5, 9, 11.

21. See the essay 'On the External Senses'. For a kindred view of Smith's conception of knowledge, see Lindgren, *The Social Philosophy of Adam Smith*, ch.1.

22. It is in much the same way custom gains an influence on judgement of beauty. If there is any break in the habitual coherence of things, "We miss something we expected to find, and the habitual arrangement of our ideas is disturbed by the disappointment" (TMS, V, 1, §2).

23. Lindgren, *The Social Philosophy of Adam Smith*, esp. pp. 16 and 74-78.

24. This is a reference to TMS, VI, ii, 2, §§15-18, a more elegant one than the footnotes of a later age.

25. Cf. also *Enquiry* 213, note. In a note to TMS, IV, 2, §3, the Editors, Professors Raphael and Macfie, point to this note in the second *Enquiry*, saying that, "Hume must have had an objection of this character put to him, for he attempts to reply to it in a footnote appended to *Enquiry concerning the Principles of Morals*, V. i, first paragraph ... ". As shown in the text above Hume does, however, deal very clearly with this issue already in the *Treatise*; pp. 471-72 are particularly clear. The *Enquiry* does not add anything new to this.

26. See TMS, VII, iii, 2, §§7-9.

27. Although Hume despairs of a full explanation at T. 617, he does, of course, characterize the difference between the pleasure/pain of moral approval/disapproval and other kinds of pleasure and pain. Apart from what is quoted and mentioned by me in the text,

he invokes his theory of the indirect passions of pride and humility, love and hatred which attend moral judgement (T. 473, 574-75, and 614). I do not think that Smith takes an explicit position on this theory.

28. And cf. e.g. VII, iii, 1, §2.
29. See e.g. II, ii, 3, §8, and IV, 2, §7.
30. See e.g. III, 5, §8; VII, ii, 2, §13; VII, iii, 1, §2; VII, iii, 3, §16.
31. This is a frequently recurring theme in the TMS. Some of the more memorable passages are: II, ii, 3, §§11-12; III, 2, §12, §§33-35; III, 5, §7, 12-13.
32. And cf. VII, ii, 1, §§45-47.
33. Cf. R.H. Popkin, "Hume and Kierkegaard".
34. This hesitation in itself shows Smith's uneasiness at the kind of strong teleological expressions which he often indulges in in the run of his argument.
35. See e.g. I, iii, 1, §7; and IV, 1, §10: "In ease of body and peace of mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for."

36. Cf. III, 2, §15: "Pain ... is, in almost all cases, a more pungent sensation than the opposite and correspondent pleasure. The one almost always depresses us much more below the ordinary, or what may be called the natural state of our happiness, than the other ever raises us above it."
37. It should be noticed that it is in this connection that Smith, in answer to Hume's criticism, clarifies the various layers in the whole sympathetic process and points out which is pleasant in itself, and which follows the quality of the original feeling (I, iii, 1, §9 note).
38. Cf. Karl R. Popper, *The Poverty of Historicism*, pp. 64-70 and *The Open Society and Its Enemies*, I, pp. 22-25 and ch. 9.
39. The whole idea of the "negative", i.e. of pain, misery, unhappiness, as in a sense of primary importance in morals has been rediscovered in our century in the form of so-called negative utilitarianism. See Popper, *The Open Society*, I, ch. 5, note 6, and ch. 9, note 2. Also H.B. Acton's and J.W.N. Watkins' symposium on 'Negative Utilitarianism'. and most important maybe K.E. Tranøy, 'Asymmetries in Ethics'. Professor Tranøy rightly points out the basic affinity between negative utilitarianism and Schopenhauer's moral theory. This whole complex of connected ideas will reappear prominently in connection with Millar and Craig.

40. Cf. also *Justice*, pp. 5-6.
41. Cf. Smith's impressive, early speculations about this in the *Rhetoric*, pp. 80-81.
42. Cf. *Justice* pp.136 and 152.
43. Cf. also Smith's nice distinction between the "rules" of justice and the "precepts" of the other social virtues; the former we "observe". the latter we "follow" (II, ii, 1, §5).
44. See also VII, iv, esp. §§1 and 7ff.
45. From this angle we will be returning to the problem below, Section 15. Smith draws the distinction between natural and acquired rights in *Justice*, p. 8.
46. It is this very basic agreement on the absolute utility, public, i.e. means-utility of justice plus Hume's well-known formulation that the strength of obligation follows the extent of utility (in the above sense), which keeps a little doubt lingering in my mind as to the identity of the "author of very great and original genius", referred to in TMS II, ii, 1, §5. Professors Raphael and Macfie maintain (p. 80, note 1 of their edition of TMS) that it must be Kames, and their most weighty argument seems to be that Kames stressed the stricter obligation of justice as compared with benevolence. But in view of the reflections above, the same seems to be the case with Hume.

47. It should be noticed that Smith takes care to refer to the moral primacy of the individual by the way he expresses himself in other places. He thus talks of the pain produced by injustice as "real and positive hurt to some particular persons" (II, ii, 1, §§3 & 5).

48. Professor Raphael has shown how this case apparently has occupied Smith from a very early date, see Raphael, 'Adam Smith and "The Infection of Hume's Society"'. The case is also mentioned in *Justice*, p. 136.

49. Cf. *Justice, op. cit.*

50. It is interesting in this connection to note that when Smith comes to show how society's or the spectators', reactions to us are internalized by mutual sympathy (in III, 2), he again draws a sharp distinction between positive and negative: praise is rarely internalized unless there are praiseworthy motives behind (*ib.* §4); but *blame* is always received and internalized, both when there are blameworthy motives behind and when there are not (*ib.* §11, and cf. *ib.* §29).

51. Cf. *Justice*, p. 152.

52. It should be noticed that the final period of this quotation spells out what is behind one of Smith's frequently repeated, and rather odd-sounding standard phrases: (a) what is, (b) what ought to be, (c) what upon a certain condition would be, the opinion of

the spectator. (a) gives the standpoint of the actual spectator; (b) gives that of the impartial spectator; and (c) gives the way the former can approach the latter, namely through the sympathetic understanding of the situation and of human nature. It is this last point which makes Smith talk of consistency in the sentiments of mankind (in the quotation): hence the Socratic role of knowledge in morals.

53. W.C. Swabey, *Ethical Theory from Hobbes to Kant*, p. 179.
Quoted from Campbell, *Adam Smith's Science of Morals*. p. 51.
54. Campbell, *op. cit.*, p. 51.
55. See Campbell, *op. cit.*, p. 52.
56. Campbell, *op. cit.*, pp. 219 and 218.
57. See TMS, VII, iv, §§7-35.
58. Note the determining influence of the particular context.
59. Nothing could better illustrate how interwoven descriptive and normative theory is for Smith than this extraordinary suggestion that the criticism of legal positivism is now on a better footing due to the improvement in the science of human nature.

60. Cf. the 'Introduction' to the *Justice*. Scattered through Smith's writings there are many descriptions of how formal law develops out of men's spontaneous search for natural justice; see e.g. *Justice*, Part I, Div. iii, §11.
61. Cf. *Justice*, p. 1: "Jurisprudence is that science which inquires into the general principles which ought to be the foundation of the laws of all nations."
62. Campbell, *Adam Smith's Science of Morals*, pp. 58-59.
63. Cf. *Justice*, pp. 1-3.
64. Reference can only be made to the set of notes edited by Cannan, since the set found more recently is still not available for study.
65. Since Roy Pascal published his 'Property and Society'.
66. For further description of the hunting stage, see W.o.N., V, i, a-b, and *Justice* pp.14-15 and 107-109.
67. This distinction between various kinds of injury should be compared with Smith's distinction between natural and acquired rights which we briefly discussed above Section 12 and note 45.
68. Cf. *Justice*, p. 109.

69. This, of course, provides the basis for Smith's criticism of the contract theory of government, see *Justice*, pp. 11-13.
70. See *Justice*, p. 16.
71. This at least seems to be the case in ancient times. See *Justice*, p. 23.
72. See W.o.N. III, iii, 3ff and *Justice*, p. 40.
73. W.o.N., III, iii, 7.
74. Skinner, 'Adam Smith: an Economic Interpretation of History', p. 167.
75. Cf. *Justice*, pp. 42-43.
76. I owe this point to Mr. J.F.G. Shearmur who has suggested to me that feudalism for Smith should be seen as an anomaly which was created by the failure of the republics to solve the problem of defence against the barbarian invasions.
77. I am greatly indebted to Mr. J.F.G. Shearmur for three or four years' discussion of many of the following points.
78. Pascal, 'Property and Society', p. 173.
79. Meek, 'Smith, Turgot, and the "Four Stages" Theory', p. 10.

80. Meek, *op. cit.*, pp. 9-10. It should be remarked that this is a general summary of the views of the Scottish Historical School, of which Meek considers Smith one of the pioneers and John Millar the Master.

81. Meek, 'The Scottish Contribution to Marxist Sociology', p. 40.

82. Skinner, 'Adam Smith: an Economic Interpretation of History', p. 175. In a note Mr. Skinner refers to the relevant, and rather interesting, passage from Engels: "In a letter to J. Bloch, dated September 1890, Engels wrote that 'According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life. More than this neither Marx nor I have ever asserted. Hence if somebody twists this into saying that the economic element is the *only* determining one, he transforms that proposition into a meaningless, abstract, senseless phrase' (*Marx-Engels, Selected Works* (1958), ii, 488)." (Skinner, *op. cit.*, p. 175, note 53).

83. The distinction between basic subsistence needs and "the pleasures of wealth" which we meet in this discussion is obviously closely related to Smith's famous distinction between necessities and luxuries in *W.o.N.*, V, ii, k. It should, nevertheless, not be confused with this, for Smith is very emphatic in the latter discussion that the level of necessities is *socially* determined. We are thus, once again, being presented with an implicit

confrontation between something "artificial" and something "natural". How the two distinctions in Smith are related and also how they lead forward to the basic idea behind diminishing marginal utility is outside what we can deal with here.

84. Cf. our extensive discussion of this function of mutual sympathy, above Sections 3 and 4.
85. Cf. also the description of "The poor man's son whom heaven in its anger has visited by ambition" (TMS, IV, 1, §8).
86. Cf. also W.o.N., III, iii, 12.
87. Skinner, 'Adam Smith: an Economic Interpretation of History', p. 155.
88. Skinner, 'Adam Smith: Science and the Role of the Imagination', p. 165.
89. I owe this point to a paper read by Mr. J.F.G. Shearmur to a seminar in the Department of Philosophy, University of Edinburgh, in 1975. The point that pleasure and pain are not as such explanatory, but are dependent upon the situation in which they occur, is also borne out by its connection with sympathy which, when it is mutual is the selector of behaviour in any situation. Cf. Sections 2 and 3 above.

90. Indeed, economic motives can themselves be explained in terms of taste, vanity, the situational factors, and mutual sympathy. It is, therefore, not inconsistent with the present interpretation that Smith explains the fact that the Dutch in his day were much more punctual in performing commercial agreements than the English, and the latter still better than the Scots, by referring to these people's self-interest in different situations. (*Justice*, p. 253.)
91. See also *Rhetoric* pp. 168-70 and 174-75, and W.o.N., V, i, b, 24-25.
92. Cf. W.o.N., I, viii, 24, where Smith talks of this delay in development as a matter of more than 500 years, and possibly much more.
93. Meek, 'Smith, Turgot, and the "Four Stages" Theory', p. 9.
94. See *Justice*, p. 44.
95. See *Justice*, Part IV, and pp. 26ff., and W.o.N., V, i, a.
96. See *Justice*, pp. 263f. I am also here indebted to Mr. J.F.G. Shearmur.

97. K.R. Popper, 'On the Theory of the Objective Mind'. *Objective Knowledge*, p. 179. See also his *The Open Society and Its Enemies*, Vol. II, Chapter 14 (esp. pp. 97 and 265); *The Poverty of Historicism*, Sections 31-32 (esp. p. 149); and 'Die Logik der Sozialwissenschaften'.

98. Cf. Popper, *Objective Knowledge*, p. 179. Professor L. Pompa has stressed the importance of this distinction (private correspondence), and I am greatly indebted to him for discussion of this and related points.

99. Skinner, 'Adam Smith: an Economic Interpretation of History', p. 175.

100. Roy Pascal makes a typical non sequitur in this respect:
 "Social development, following the development of property and wealth, can only take place if the necessary conditions of exchange exist ... Smith sees social development, therefore, as a completely ... material process." ('Property and Society', p. 171). What is taken as a necessary condition in the first sentence, seems clearly to have been transformed into a sufficient condition when we reach the second sentence. It is exactly this transformation I deny in Smith.

101. The whole discussion of the economic interpretation of Smith in the present Section applies in virtually every detail to Millar as well, for Millar's work consists to a very large extent in a detailed elaboration of Smith's ideas of a history of society

and law, and the description of these ideas in the preceeding Section does, therefore, also to a large extent apply to Millar. In the critical literature Millar has been taken as quite as much, or even more, of a "materialist". Apart from the literature quoted above in connection with Smith, see especially W. Sombart, 'Die Anfänge der Soziologie'.

Vague or uncommitted are:

W.C. Lehmann, *John Millar of Glasgow, 1735-1801*, esp. pp.131ff.

A.S. Skinner, 'Economics and History - The Scottish Enlightenment' and 'Natural History in the Age of Adam Smith'.

A.L. Macfie, 'John Millar - A Bridge between Adam Smith and Nineteenth Century Social Thinkers?'.

H. Medick and A. Leppert-Fögen, 'Frühe Sozialwissenschaft als Ideologie des Kleinen Bürgertums: John Millar of Glasgow, 1735-1801'.

The last mentioned article will be the object of a special discussion in Appendix C below.

102. To what extent Smith's many concrete policy proposals are based on natural justice is an extremely interesting question, the answer to which, however, is of so Herculean proportions that it must be renounced here.

CHAPTER IV. NATURAL JUSTICE IN MILLAR AND CRAIG

1. There are a number of problems with the texts, esp. the *Sidney*, which are of some importance for the understanding of this Chapter. I have dealt with these problems in Appendix B, which should be read first. See also Chapter I (text to note 10).

2. See 'Life', pp. xxiv-xxv; *Elements*, I, p. 74; *ib.* Book I, Chap. I, Sect. 1; and *ib.* p. 274.
3. See 'Life', pp. xxvi-xxxviii; *Elements*, I, Introduction; *Sidney*, Letter No. 9.
4. 'Life', p. xxvi; and in the *Elements*, I, p. 47, Craig claims that, 'Mr. Hume's system ought to be considered as an essential part of that of Dr. Smith.'
5. See 'Life', pp. xxxi-xxxii; *Elements*, I, pp. 10-15. It is interesting that Craig in the former place, in discussing the relationship between aesthetic and moral judgements, compares Millar with Kames. And maybe even more interesting that Millar himself, when elaborating upon this in his Civil Law Lectures, refers to Burke.
6. Pt. I, Sec. I, Ch. V of the TMS.
7. It seems to me rather significant that Craig on this point refers to *Hume*, rather than to Smith (*Elements*, I, p. 26, note), and to the *Second* Book of the *Treatise* (the reference is to the seminal paragraph in II, ii, 7, pp. 370-71). It is things like this which open one's eyes to the possibility that there is more in common between Hume and Millar-Craig than is often allowed for. In many ways it would have seemed much more obvious for Craig here to ^{have} referred to the final three paragraphs

of the very first chapter of Smith's *Theory of Moral Sentiments*! Those are the paragraphs on sympathy with the insane, the baby, and the dead. It seems to me that Craig's words about Millar very much apply to himself, i.e. that he was, 'A zealous admirer of Mr. Hume's philosophical opinions, which he had early adopted, ...'. 'Life', lxi.

8. For those points, see *Elements*, I, pp. 23-31.
9. *Elements*, I, pp. 19-21. Craig here takes the impartiality of Smith's spectator somewhat too literally and, with a well-known mistake, makes him a rather mystical "third man". On this basis he rejects Smith's idea of the double sympathy involved in judging of ourselves as too intellectualistic and an embarrassment which makes it impossible for him to explain the stronger feelings involved in those judgements compared to judgements of others. *Op. cit.*, pp. 21-22, note.
10. 'Life', xxvii-xxviii; *Elements*, I, pp. 32-48.
11. *Elements*, I, pp. 33-37.
12. Although Craig gives no more than the indication of a theory of obligation (*Elements*, I, pp. 38-39), it is quite remarkable that he does so by means of a rather Hume-like idea of association, whereas Smith's spectator theory is not to be sighted.

13. Craig lists some of the features of indirect utility which on the whole weaken it against propriety and direct utility (*Elements*, I, pp. 42-47). Craig's treatment of general rules and indirect utility is somewhat peculiar, for although there is a connection between them, as he shows, they really constitute two independent problems. Thus one would expect that both propriety and direct utility were subject to rules to a certain extent as well.

14. *Elements*, I, p. 19, note. Cf. also 'Life', xxvi-xxvii, and *Elements*, I, p. 47, note. It cannot be denied that Craig betrays himself as a rather poor scholar, as far as those basic moral principles are concerned; and much the same goes for Millar in the Lectures. At the last mentioned place he sees Hume as the progenitor of the utility concept; Smith as that of the idea of sympathetic understanding of utility; and neither of them as having understood the importance of indirect utility. But of course all three ideas are to be found, in one form or another, already in Hume.

15. *Elements*, I, Book I, ch. 2.

16. *Hist. View*, IV, Essay 6. Millar does, however, turn to some of the theoretical points involved, in the following Essay 7, as we will see. He draws the distinction between self-regarding and other-regarding virtues, *ib.* pp. 273-74.

17. *Elements*, I, pp. 49-62.

18. *Elements*, I, p. 47, note.
19. *Elements*, I, pp. 55-56. But he goes on to point out that as this "warmth" never reaches the level of resentment and desire for punishing, it is not strange that religious restrictions on intemperance are never enforced by law for very long in any society. It should be noted that in his treatment of the third personal virtue, fortitude, (pp. 58-62), Craig clearly echoes Smith's well-known chapter 'Of the Influence of Custom and Fashion upon the Moral Sentiments', TMS, V. 2.
20. This rather broad meaning of justice seems to be common to all our four authors.
21. Craig also refers to impropriety in passing, and thus confirms that an unjust act is improper (which we could not logically conclude from his statement that propriety is a necessary condition for justice).
22. Craig rounds off his Section 'Of the Social Virtues' with a discussion of those virtues which are a mixture of benevolence and justice, i.e. those which arise from (a) gratitude, (b) filial relation, and (c) parental relation (pp. 74-83). His general point in this discussion is that benevolence is the prevalent element in those virtues and that it, therefore, cannot be regarded as injury to neglect them. Accordingly they cannot

be enforced by law, and already existing laws to that effect are unjust and ought to be abolished. Those duties should be purely moral (*ib.*, 82-83). This latter is an important theme to which we will return.

23. *Hist. View*, IV, 272-73.
24. See the previous Essay No. VI on 'The Effects of Commerce and Manufactures, and of Opulence and Civilization, upon the Morals of a People', Section iii, 'Of Justice and Generosity'. (pp. 235-36).
25. The text says "virtue", but this is corrected in the Errata list.
26. *Sidney*, pp. 44-45. This theme is taken up in our detailed discussion of the *Sidney* in Section 9 below.
27. *Elements*, I, p. 84.
28. *Ib.*, pp. 91-92. Craig does not spell this out in detail here but refers to his preceeding treatment of those points. It is interesting that Craig continues to point out that Godwin makes this doctrine rather vacuous by introducing the idea of "a certain sphere of discretion" in the 2nd edition of his *Political Justice* (cf., however, D.H. Monro, *Godwin's Moral Philosophy*, pp.117-18).

29. *Hist. View*, IV, p. 294. We will return to this important passage in Millar below, note 37.

30. " ... political conclusions referring altogether to the condition of man in society, the continuation of natural rights after the institution of government, is the only circumstance which can render their original existence a matter of * practical importance" (*Elements*, I, pp. 134-35). The sign * indicates a correction in the printed text. Craig entered corrections and additions in handwriting in his own copy of the *Elements*, which is kept in the Kashnor Collection in the National Library of Australia in Canberra. I have used this copy throughout. Most of these notes fall in either of two categories, (a) stylistic improvements of the text (including corrections of misprints); (b) political-historical comments from hind-sight.

31. Quoted by Craig (p. 170) from *Du Contrat Social*, Liv. I, Chap. VIII (p. 247 in the Classiques Garnier edition, Paris, 1962).

32. See *Elements*, I, p. 91, for the division of natural rights into two broad classes, and see the previous Section for my discussion of this.

33. See *ib.*, p. 142, " ... when new privileges are to be created, the language of the law is changed; in place of being prohibitory it becomes permissive, originating and conferring

such rights as did not formerly exist."

34. See *ib.*, pp. 113-19, and below Section 7.

35. See *ib.*, p. 144, and cf. p. 152.

36. See *ib.*, pp. 112-22.

37. Most of the points in this whole theory of the existence of natural rights in society are summarized in less than two pages by Millar in *Hist. View*, Vol. IV, pp. 294-95:

"There are natural rights, which belong to mankind antecedent to the formation of civil society."

They concern our personal safety, the "exercise of our natural liberty, so far as it does not encroach upon the rights of others", and our property (gained by occupancy or by labour). The rights continue to exist in society, but some are modified and some are resigned (the right to punish; part of our property (for taxes); and in general "we must yield obedience to the legislative power"). In all cases we do, however, only give up rights in order to achieve the general purposes of social life. It is the ability to combine social life and maximum liberty that is the testing ground for "the various political systems which take place in the world".

38. There are some few, obvious exceptions to this, such as absolutely necessary expropriations, which require "particular laws".

39. At the outset of this discussion, pp. 94-95, he makes a distinction between the origin of government, and the justification of it, and maintains that these two are completely separate. This and other similar statements by him are of quite fundamental importance for our evaluation of the very character of his theory and of its relationship to that of Hume and Smith; and we will return to it in Section 11.
40. Craig refers to Locke and Sidney, and points out how this argument had gone out of fashion since their days (*ib.*, p. 97, note). Millar made short shrift with this traditional theory as well, for he "dismissed, as scarcely worthy of refutation, the doctrine of Divine Right" ('Life', xlix).
41. Hume is not mentioned, but one certainly feels his influence here!
42. Cf. *Elements*, I, 336-37, where Craig virtually restates what I have called Smith's moral theology (cf. Chapter III, Section 8; and Section 13 of this Chapter).
43. This criticism of tacit consent as well as the idea of the multiplicity of reasons for why individuals stay in a country, are also to be found in Millar, *Hist. View*, IV, pp. 303-304.
44. Cf. *Hist. View*, IV, p. 301, where Millar makes the redundancy of the contract clear. It is, of course, Hume's old idea and, indeed, it is not surprising to hear that Millar in his Lectures

on Government "was at some pains to enforce Mr. Hume's objections to the fiction of an Original Compact, long the favourite opinion of the English Whigs"! ('Life', xlix-1).

45. And he criticizes Hume for denying this (p. 126).

46. It is a measure of just *how* clearly Craig had thought about his priorities that he condemns the ideology of the French revolution for fostering this doctrine:

"Most of the writers in favour of the French revolution seem to have fallen into this mistake. It gave rise indeed to the most reprehensible articles of the Declaration of the Rights of Man, and of a Citizen, which preceded the French Constitution of 1791. The opinion seems to have been adopted, without due consideration, from the writings of Rousseau." (*Elements*, I, 156, note).

This footnote and the text to which it is added contains in a nutshell the clash between the old liberalism and what J.L. Talmon has called totalitarian democracy. We repeatedly witness how Millar-Craig's very balanced attitude to the French revolution springs directly out of their view of politics and the state as a mere tool for higher purposes.

47. This contrast between rights as fundamental and government as derivative and a mere means is reflected in another, very interesting contrast. According to Millar rights are very uniform, whereas

systems of government vary extremely from one place and time to another. This difference reflected itself in Millar's Lectures on Civil Law and on Government respectively; see 'Life', pp. xliii-xliv; and cf. *ib.*, pp. c-cl.

48. See *Hist. View*, IV, pp. 287-310, and cf. 'Life', p. 1.
49. See Appendix E.
50. The most important passages on which I base my account are:
Hist. View, IV, 275-81; 'Life', pp. xxxiv-xl; and *Elements* I, pp. 116-19 and 275-81.
51. Craig stresses this problem and strongly criticizes the fathers of the French 1791 Constitution for making "the judges dependent upon popular favour" (*Elements*, I, p. 276, note).
52. Here is yet again an "aesthetic" idea adapted to the moral sphere; in a sense it is complementary to the idea of the unexpected and unusual, which arouses wonder and surprise. Both ideas, of course, are formulated by Smith.
53. This argument is obviously the "sociology of knowledge" version of Hume's and Smith's argument against all legal positivism, viz. that all positive legislation *presupposes* that men already have basic ideas of justice and injustice, an argument which,

of course, follows directly from the doctrine of natural justice.

It is interesting to speculate that it is the idea of the limitation on our reasoning faculties and, particularly, the point that we cannot *construct* ideas, and hence evaluate, independently of the elements in the situation surrounding us, which is the background to Millar's enthusiasm for "the good old Humean philosophy".

There is a further, rather obvious element in the theory, which points beyond Hume (and which one need not be a Wittgensteinian to notice): At least some ideas are not just formed as reflections of reality; they are formed as part of an ongoing *activity*. Apart from being interesting in itself, this is also of importance in so far as we may here have an indication of the theoretical background to the (Smithian) idea that a society which, like a liberal market economy or "commercial society", increases the activity of the people, is also productive of new knowledge. This is particularly clear in Millar's Essays IV, V and VI of Vol. IV of the *Hist. View*.

It is exactly the same idea which Craig brilliantly uses in arguing for some kind ^{of} involvement of the people in the politics of a society. At the end of Sec. I, Ch. II, Bk. I of the *Elements* (I, pp. 178-82) he argues, by means of historical examples, that all the various aspects of culture have reached their high points in the wake of political upheavals and exertions involving the people. This involvement and its

effects may become permanent, and yet avoid all the disastrous aspects of political unrest, if a form of government is introduced which draws in the people. This view of culture as the concomitant of exertions in active life is, of course, well-known from Adam Ferguson; and the argument from educative involvement is the whole point of de Tocqueville's defence of democracy in *Democracy in America* as well as the argument for democracy which a modern "old" liberal like von Hayek takes as the strongest available (see his *The Constitution of Liberty*, pp. 108-109).

54. See *Hist. View*, IV, pp. 58, 235ff., 278; and 281: "But though the rules of justice derive their origin from the business of the world, and are introduced by the actual decisions of judges, their extensive utility is likely to attract the notice of speculative reasoners, and to render them the subject of criticism and philosophical discussion."
55. In the following I take *Sidney* as the leading text because it is the earliest and *may* be Millar's rather than Craig's. But there is not much to distinguish one text above the other. There are some details and elaborations added in the *Elements*, and some references to the politics of the 1790's are left out. There is only one major rearrangement of the argument (see below, note 58); the material of the first and the final letter is either scattered elsewhere or left out; and there is added one full Section, 'Of Sumptuary Laws', which questions

the expediency of such laws.

56. See John Hicks, *A Theory of Economic History*, for the broadest historical perspective.
57. *Sidney*, p. 27; cf. *Elements*, II, p. 209.
58. In the *Elements* this is rearranged so that the decisive argument of Letter IX (and most of Letter X) comes first (II, pp. 209ff.), whereas the material of Letters VII and VIII is pp. 218-30; in many ways a better arrangement.
59. This is particularly well expressed in a passage which exhibits all the charm of the intelligent political pamphlet, combining clear principles and day to day politics:
"General reasonings, respecting expediency, may, undoubtedly, direct the opinions of those, who have leisure and ability to trace the operation of causes in their most remote effects, and obvious utility will, in some degree, influence the decisions of all; but a consent of mankind so universal, as we find taking place on this subject [of property], must be produced by a sentiment inseparable from human nature, which can neither be silenced by partial views of self-interest, nor misled by sophistry. It is the more necessary, Sir, to investigate these principles, as the First Minister of State [Pitt] has thought proper lately to declare [footnote: "In the debate on the Succession Tax."], that the

right of property is altogether the creature of civil society [footnote: "Mr. Pitt has borrowed this opinion, without acknowledgement, from Rousseau - *Du Contrat Social*, Liv. I, Chap. IX."]; from which opinion it would incontestably follow, that a vote is the only criterion of justice, and that the majority, whenever they are so disposed, have a full right to equalize property, or to institute a community of goods. I hope, on the contrary, to be able to show, that a majority possesses no such rights; that property is defended by the natural feelings of mankind; and that all levelling, whether supported by many or by few, must occasion the greatest injustice." (*Sidney*, 43-44).

60. See the admirably clear passage to this effect in *Sidney* pp. 44-45 (*Elements*, II, pp. 210-211). I deal with this passage in Appendix C.
61. A footnote refers to "Hume's Essays, Part I, Essay V". This is 'Of the Origin of Government', and the relevant passage is *Essays*, I, p. 114.
62. In this connection it is important to notice that Millar is quite clear about the social dangers if "utilitarian" considerations become too prevalent. In *Hist. View*, IV, pp. 260ff. he argues that when justice in "opulent and luxurious nations" comes to be judged more and more by "considerations of

interest", then there is a danger that some people may find that *their* interest lies somewhere else. This can have catastrophic consequences. His examples are the Roman provincial governors and modern mercantile companies with a monopoly on trade "in very distant countries". Millar undoubtedly had the East India Company in mind.

63. This is in the *Elements*, II, pp. 214-15.
64. This corresponds to *Elements*, II, pp. 215-18.
65. In view of this very balanced view of inequality of property and in view of the complete and emphatic rejection of all levelling both in *Sidney* and in Craig's *Elements*, it is surprising, or maybe not so surprising, that R.L. Meek in his essay on 'The Decline of Ricardian Economics in England' says that,

 "A significant number of economists was at this time becoming conscious of the fact that the labouring classes were beginning to think for themselves and to question the moral validity of the foundations of the social structure. In his *Elements of Political Science*, published in 1814, John Craig could remark that 'the fear of levelling is altogether chimerical'". (Meek, *Economics and Ideology*, p. 69. The reference in the *Elements* is II, p. 230). This leads one to think that for Craig levelling was not all that bad an idea; whereas his real standpoint is that this fear of levelling is "chimerical",

1) because levelling is so patently against natural justice that virtually everyone would reject it out of hand; 2) because it stems from a false interpretation of historical cases of "levelling", which, in his view, were all concerned with civil, and not natural rights! As to "the moral validity of the foundations of the social structure", the point of the argument in the *Sidney* and in the *Elements* is that certain aspects of this structure are immoral, in that they are unjust; but, on the other hand, all schemes of levelling are much more immoral by the same token.

66. Cf. *Elements*, II, p. 239.

67. *Sidney*, p. 54. Letter No. XI corresponds to *Elements*, II, pp. 239-45; letter No. XII to pp. 245-51.

68. Letter No. XIII = *Elements*, II, pp. 251-57; letter No. XIV = *Elements*, II, pp. 257-63.

69. Entail obviously succumbs to the same argument (Letter No. XIV, *Elements*, II, pp. 261-63).

70. Cf. *Elements*. II, pp. 263-70. The distinction between necessities and luxuries (or superfluities) is, of course, well-known from Smith (W.o.N., V, ii, k), and we have mentioned it briefly in note 83 to Chapter III. It seems obvious that it is this

distinction which leads Craig so close to seeing the connection between marginal utility and value in the *Remarks on Some Fundamental Doctrines in Political Economy*. It should be noticed that both in the *Letters of Sidney* and in the *Elements* there is an attempt to distinguish between three categories: "necessaries, comforts, and superfluities" (*Sidney*, p. 75). This seems to be an attempt to refine Smith's troublesome distinction - maybe in light of the fact that Smith really has two different distinctions, as pointed out in my note mentioned above. As becomes clear later in the *Elements* (Book III, Part II, Chap. II, Sects. i and ii), Craig associates this distinction with the broad division of society into the labouring poor, the middling ranks, and the rich; and it also provides the framework for his discussion 'Of Taxes on consumable Commodities'.

71. It will be noticed that all those arguments rely on the usual, allied pairs of opposites:

the natural vs. the deliberately created

the unchangeable vs. the changeable

justice vs. utility

rights vs. statute.

The idea of artificiality vs. nature is conspicuous for its absence. It would have caused nearly as much havoc in this list of opposites, as did $\sqrt{2}$ in that of the Pythagoreans.

72. This discussion of the *Letters of Sidney* is taken up again in Appendix C in the context of a rival interpretation. This discussion is complementary to the one presented in this Section.
73. Cf. Smith, W.o.N., I, x, ii.
74. Exceptions are the political, and anonymous, pamphlets *Crito* and *Sidney*, the latter of which may not be by Millar; cf. Appendix B.
75. See the literature referred to in Section 16 of Chapter III above.
76. The bulk of Millar's published work is a detailed application of Smith's theories, primarily in the context of Great Britain, but also a good deal of other historical material is dealt with.
77. See Chapter III, Section 16 above.
78. Cf. Skinner's interpretation of Smith by means of Engels's idea of the "economic" as the "ultimate"! See Chapter III, Section 16, and note 82.
79. See *Hist. View*, IV, pp. 282-83, and 'Life', xxiii-xxv.

80. *Hist. View*, IV, pp. 283-84, and 'Life', xxiv-xxv.

81. *Hist View*, IV, pp. 284-85, and 'Life', xxv-xxvi.

82. *Hist. View*, IV, pp. 281 and 284.

83. He is describing how Millar's work on bringing the *Hist. View* up to his own time (i.e. what really should have been Vol. IV) was interrupted by his involvement in the debate about the Revolution and the war.

84. Hans Medick has clearly seen that Craig's work has this "grosse disziplingeschichtliche Bedeutung"; but he has not sufficiently clearly seen that the crucial move is the discarding of history from any theoretical role. Seeing nothing in Craig's work but a plagiarism of Millar, he takes the latter and, through him, Smith as the founder of political science as an independent discipline. See Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft*, Ch. VI, Sec. 2, esp. pp. 187-89.

85. See *Elements*, I, pp. 278-80.

86. Craig, of course, means an abstract/^{system}of law, as is clear from the context.

87. Cf. *Elements*, I, 345: "That degree of resentment ... which all mankind acknowledge to be just, or rather the indignation excited by crimes in the breast of impartial spectators, is the great original foundation of the right of punishment, and furnishes the standard by which its just degree may, in every case, be ascertained."

88. Craig is here clearly taking over what I called Smith's "moral theology"; See Chapter III, Section 8; and cf. also note 42 to the present Chapter.

89. See *Elements*, I, 340-42, esp. p. 342: "Whether there be what might be termed absolute desert, or whether man, if capable of comprehending at one glance the infinite progression of moral and physical causes, might continue to judge of merit and demerit as he does at present, is a consideration totally foreign to our enquiries. It is enough that no individual has ever existed, to whom, in real life ... the ideas of merit, justice, and retribution, did not seem essential parts of human nature."

Craig seems to be getting at the idea that punishment presupposes something between absolute determinism and absolute indeterminism, for the whole idea of punishment is to "softly" determine, or "influence", the offender. Absolute indeterminism, in the sense of arbitrariness, would exclude this. Absolute determinism is not presupposed, and it is beyond humans to establish or refute it. Cf. my analogous speculations in connection with Smith's view of

history, Chapter III, Section 16.

90. See Chapter III, Sections 10 and 11, and esp. note 39.

91. This distinction between the rules of natural justice and formal laws is obviously closely connected with the distinction between nature and artifice. The location of this distinction has, however, obviously changed somewhat between Hume and Craig.

Concerning Craig's "anti-law" philosophy in general it should be remarked that it undoubtedly has some reference to the general debate in Scotland about legal reforms (esp. jury trial) in those years. About this debate, see N.T. Phillipson, *The Scottish Whigs and the Reform of the Court of Session, 1785-1830*.

EPILOGUE

1. In the case of *Hist. View* Millar's son-in-law, James Mylne, was co-editor.

2. James Mill, Review of *Hist. View* in *The Literary Journal or Universal Review of Literature Domestic and Foreign*.

3. Mill's description of Hume's philosophical history is extremely interesting and clear:

'Mr. Hume was the first author who exhibited the complete union of history and philosophy. Not satisfied with composing a more elegant narrative, than had been done by any one before him, of

the military transactions of his country, of the succession of her kings, and the principal events of their lives, the business of the common historian; he proposed to himself as a particular object to describe the mode in which the people, at every particular period, were sorted, and arranged, the mode in which they were connected together, the mode in which they were governed, and the mode in which they lived both at home, by themselves, and in the state with others. The last and great point to complete the philosophical delineation, was to point out the manner in which the principles of human nature operated in conjunction with the circumstances in which the people were placed, to produce the political changes; and thus to refer particular facts to general laws, the real business of philosophy." (Mill, *op. cit.*, 325-26).

4. Mill, *op. cit.*, p. 326.
5. James Mill, Review of *Ranks* in *The Literary Journal or Universal Review of Literature Domestic and Foreign*.
6. Mill, *op. cit.*, p. 625.
7. Mill, *op. cit.*, p. 629.

APPENDIX A. NATURAL OBLIGATION IN HUME

1. Hobbes's theory of obligation is extremely complicated and hopelessly contradictory in places. This has sparked off a very extensive literature during the past generation or more. In my Danish prize-dissertation on *Sammenhaengen mellem Hobbes's metafysik og hans statsteori* (The Connection between Hobbes's Metaphysics and His Political Theory), University of Aarhus, 1970, I tried to show that he has two different concepts of obligation, a) a natural obligation-of-the-will which is caused by the laws of nature, and b) a moral obligation which arises from self-imposed covenants (*op. cit.*, pp. 110-121).

APPENDIX B. THE WORKS OF MILLAR AND CRAIG

1. First published in 1771 under the title *Observations Concerning the Distinction of Ranks in Society*. All references are to the fourth edition, Edinburgh 1806.
2. The first edition (1787) and the second edition (1790) only took the history "to the Accession of the House of Stewart", but in the posthumous third edition (1803) the editors, J. Craig and J. Mylne, incorporated a volume covering the period to 1688, which was ready for the press, as well as a volume of Dissertations, as indicated by the title. I am referring to this third edition (in four volumes). For the details on Millar's writings, see Lehmann, *John Millar of Glasgow, 1735-1801*, Ch. VI, and pp. 415-16.
3. John Craig, 'Account of the Life and Writings of John Millar, Esq.', p. lxxxvi. This 'Life' prefaces Craig's edition of the *Ranks* (1806).
4. First as letters to the Editor in *Scots Chronicle* (Edinburgh) from May to September 1796. Republished in pamphlet form same year. See Lehmann, *op. cit.*, pp. 56, 404, and 418; and Medick and Leppert-Fögen, 'Frühe Sozialwissenschaft als Ideologie des kleinen Bürgertums: John Millar of Glasgow, 1735-1801', pp. 23-24.

5. First published in part as letters to the Editor in *Scots Chronicle*, August to November 1796; published in full as a pamphlet same year. See Lehmann, *op.cit.*; Medick and Leppert-Fögen, *op. cit.*; and Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft*, p. 187, note 42.

6. See Lehmann, *op. cit.*, pp. 56, 60, and esp. Appendix II for a discussion of this point and generally about Millar's possible anonymous works.

7. Lehmann, *op. cit.*, p. 56, and cf. *ib.*, pp. 404-405.

8. *Op. cit.*, p. 405.

9. Medick, *op. cit.*, p. 187, note 42.

10. Medick, *op. cit.*; and Medick and Leppert-Fögen, *op. cit.* p. 24 and p. 43, note 29. Craig's *Elements* was published in three volumes in Edinburgh, 1814.

11. Millar was not only Craig's professor, but also his uncle.

12. Lehmann, *op. cit.*, p. 404.

13. Someone must have seen this possibility before. On the title page of the copy of *Sidney* preserved in the Edinburgh Public Library is added, by hand and in old ink, "By John Craig, Esq.". It is, however, not in Craig's handwriting!
14. Although Medick, *op. cit.*, p. 186, note 41, *believes* that one set of student notes is a transcript of Millar's own lecture notes. But see Meek, *Social Science and the Ignoble Savage* for a note of caution (note 143, p. 165).
15. For very general descriptions of these lecture notes, see Lehmann, *op. cit.*, pp. 57-58 and 407-409; and Medick, *op. cit.*, pp. 185-189. Both Lehmann and Medick think that the notes on Millar's Lectures on the Science of Government ought to be published in some form, and Medick (*op. cit.*, p. 186, note 41) actually promises to do so. It is much to be hoped that this will happen.
16. Medick, *op. cit.*, pp. 185-189.
17. *Op. cit.*, p. 187, note 42.

APPENDIX C. MILLAR: "IDEOLOGE DES KLEINEN BÜRGERTUMS"?

1. Hans Medick and Annette Leppert-Fögen, 'Frühe Sozialwissenschaft als Ideologie des kleinen Bürgertums: John Millar of Glasgow, 1735-1801'.

2. These quotations are from Smith's W.o.N., I, iv, 1. Smith and Millar are taken by our authors as being in much the same quagmire, Millar being the deeper in it. Concerning Smith, see also Medick, *Naturzustand und Naturgeschichte*, pp. 287ff., where the author levels much the same criticisms against Smith as the present ones against Millar. It is, in my opinion, particularly unfortunate that Medick rounds off his discussion of Smith with this ill-founded criticism, for his treatment of Smith in chapter VI is the one in the whole Smith literature which comes closest to an adequate account of the integrated role of history in Smith's theory of natural justice (although there is no suggestion about the exact nature of the normative basis).
3. All references in brackets in this Appendix are to Medick and Leppert-Fögen, *op. cit.*
4. Medick and Leppert-Fögen refer to Locke: "Millar schliesst sich in den 'Letters of Sidney' explicit der Lockeschen Arbeitslegitimation des Eigentums an; s. den Hinweis auf das klassische Kap. V des II. 'Treatise of Government' in Sidney IX, 45." (P. 44, note 50). The authors take it as established that *Sidney* is by Millar. We have disputed this above, but to simplify the argument of the present Appendix, we will leave it alone. Whether Millar or Craig wrote the *Letters*, our authors are equally wrong.

5. *Sidney*, p. 23; quoted by Medick and Leppert-Fögen, p. 30.
6. *Sidney*, pp. 44-45; repeated in *Elements*, II, pp. 210-211, where Craig at the end adds a reference to "Kames's Hist. Law Tracts, Tract III".
7. I have italicized the "seems" which I suggest is to be read as "seems to the spectators".
8. This is repeated in *Elements*, II, 211-212.
9. *Ranks*, p. 231; quoted by Medick and Leppert-Fögen, p. 29.
10. *Hist. View*, IV, pp. 130-31.
11. It is, in view of this, a strange misunderstanding when Medick and Leppert-Fögen, p.23, say that it is Parliament which, according to Millar, should *distribute* property. All Parliament should do is, of course, to abolish the old inheritance laws and then let the distribution of property run its own course, Millar being confident that this would mean less excessive inequality.

APPENDIX D. TENSIONS IN MILLAR?

1. Schneider, 'Tension in the Thought of John Millar'.
2. Schneider, *op. cit.* pp. 2089-2090.
3. And this even applies to the Catholic Church which Schneider makes so much of.
4. See Millar's very balanced, and curiously overlooked, judgement of modern society in *Hist. View*, IV, pp. 253-55.

APPENDIX E. CRAIG ON POLITICAL POWER

1. See Chapter IV, Section 7.
2. This is mentioned in note 53 to Chapter IV.
3. *Elements*, I, pp. 202-205. In 1841 Craig added the following interesting note in hand on p. 204 (it is appended to the paragraph ending " ... enormous fortunes"):
 "These observations have been confirmed by the open venality of the Boroughs in which the *freemen*, mostly people of the lowest classes, have unfortunately continued as electors under the Reform act ... 1841 ..."

4. After rejecting Hume's idea of double elections (which was tried out in France in 1791, and endorsed by Macintosh) as an alternative to restrictions in universal suffrage, Craig adopts the latter (pp. 208ff.). But in 1830 he added in hand a long note discussing the possibility of the ballot. It is at the bottom of pp. 208-211:

"Another plan for checking the corruption attendant on Uni. Suffrage is the Ballot. As a voter after being bribed might disregard his promise, it is conceived that no person would bribe him. Mankind however are not sufficiently base to destroy all confidence in their promises - The ancients founded freedom on Virtue; some moderns think it rests more safely on the lowest degradation of the people. Ballot, too, along with Un. suff. would destroy that influence of the higher orders which would be necessary to prevent Laws from being dictated by ignorance or partial interest - Destruction of [one word illegible] Machines in England. 1830.

Whether Ballot might be useful with a moderate qualification may admit of doubt - probably it would be nugatory."

It is impossible to say whether the final paragraph was added later than the preceding. The ink and the handwriting are rather uneven in both parts.

5. Craig introduces this argument in dismissing the well-known criticism of universal suffrage, that it would be subversive of property (*Elements*, I, pp. 196-202).

6. If he had maintained the importance of formal law, he would undoubtedly have found more substantive tasks for the upper house, namely in securing the justice of such law. As it stands, Craig does not seem to see much more in the senate than a duplicate house of representatives, elected in a slightly unusual way. In this he contrasts interestingly with a modern, liberal proposal for a senate, that of F.A. von Hayek; but then Hayek is a great believer in formal law. See esp. Hayek, *The Confusion of Language in Political Thought*, and his *Law, Legislation, and Liberty*, Vol. 1; and as far as law is concerned, of course also, *The Constitution of Liberty*.

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